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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945 46

No. 221 23

TAZE HAMRICK GIBSON, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 13, 1945
CERTIORARI GRANTED OCTOBER 22, 1945

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a [Caption omitted.]

b In United States Circuit Court of Appeals, Eighth Circuit

No. 13,049. January Term, 1945

TAZE HAMRICK GIBSON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of South Dakota

Order denying bail and advancing hearing on appeal

February 19, 1945

On consideration of the application of appellant for bail pending appeal and the showing in support thereof, such application and the granting of bail pending appeal are hereby denied. The alternative application of appellant for advancement of the hearing on the appeal is hereby granted to the extent that the appeal will be set for hearing at the May Term, 1945, provided the record, printed record, and briefs of appellant are all filed within such time as to permit the filing of briefs by appellee under the Rules and to enable the Court to hear the matter at that Term.

c In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Order

March 20, 1945

This matter comes before the Court upon the application of appellant to proceed further in this appeal in forma pauperis. It is made to appear that appellant has procured and paid for a transcript which has been filed in this Court and that a deposit of Forty ($40.00) Dollars has been made to cover general Clerk's costs.

It is ordered that the Forty ($40.00) Dollars heretofore deposited with the Clerk of this Court be used for payment of general Clerk's costs in so far as they have or will accrue in connection with this appeal; that the appeal may be presented on the typewritten transcript now on file with the Clerk of this Court; that appellant may present his case by five (5) clearly legible typewritten briefs (one of which shall be served upon and be for the use of appellee, one of which shall be for the records of this Court, and three of which shall be for the use of the Judges hearing the appeal.

1 [Caption omitted.]

2 In the District Court of the United States for the District of South Dakota, Northern Division

Ad. November Term, 1944

No. 1811 N. D.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

TAZE HAMRICK GIBSON, DEFENDANT

Indictment

Filed Dec. 6, 1944

The Grand Jury charges:

That Taze Hamrick Gibson, on or about the twenty-eighth day of August 1944, at Hill City, in the County of Pennington, in the Western Division of the District of South Dakota and within the exclusive jurisdiction of this Court, being then and there a registrant under the Selective Training and Service Act of 1940, and being then and there under the jurisdiction of the Selective Service Board A of Union County, at El Dorado, Arkansas, and was classified by the said Selective Service Board under his claim to exemption for conscientious objectors, was duly classified by said Selective Service Board for civilian work of national importance and placed in Class IV-E because he was found to be a person fit for general military service, but by reason of his religious training and belief conscientiously was opposed to both combatant and non-

combatant training and service in the land or naval forces of the United States, and after being thus placed in Class IV-E, as aforesaid, was duly assigned to work of national importance and was duly notified of his aforesaid assignment; after having been thus assigned to work of national importance under civilian direction at Civilian Public Service Camp No. 57, said defendant did so report for said work pursuant to said assignment, and was
3 thereafter transported to said Civilian Public Service Camp No. 57 on or about August 23, 1944, and enrolled in said camp; that having been thus assigned to and transported to said Civilian Public Service Camp No. 57, and having duly enrolled therein, said defendant did, at and in the County of Pennington, in the Division and District aforesaid, unlawfully, wilfully, knowingly and feloniously fail and neglect to abide by the rules and regulations prescribed and established by the Director of the Selective Service System for the conduct of registrants assigned to civilian work of national importance in such Civilian Public Service Camps, in that he, the said defendant, did then and there, to-wit: on or about the twenty-eighth day of August 1944, without authority and in violation of said rules and regulations leave and absent himself from said camp with intent on the part of him, the said defendant, to remain permanently away from said camp; that by said conduct he, the said defendant, did then and there unlawfully, knowingly, wilfully and feloniously fail, neglect and refuse to perform a duty which he, the said defendant, was charged under said Selective Training and Service Act of 1940, and the rules and regulations duly made and promulgated thereunder; that is to say, said defendant did then and there unlawfully, wilfully, knowingly, and feloniously, fail, neglect, and refuse to remain at said Civilian Public Service Camp No. 57 until lawfully transferred or released therefrom, contrary to Section 311, Title 50, United States Code Annotated, and against the peace and dignity of the United States of America.

A True Bill:

ALBRO C. AYRES, *Foreman.*

GEORGE PHILIP,
United States Attorney for the District of South Dakota.

4 [Endorsed:] No. 1811 N. D. United States District Court, District of So. Dak., Northern Division. The United States of America, Plaintiff, vs. Taze Hamrick Gibson, Defendant. Indictment Count 1—Sec. 311, Title 50, U. S. C. A. (Leaving Civilian Public Service Camp—Selective Training and Service Act of 1940.) Filed in open court this 6th day of December A. D. 1944. Roy B. Marker, Clerk.

5 In United States District Court

[Title omitted.]

Motion for subpoenas

Filed Jan. 26, 1945

Now comes Taze Hamrick Gibson, the defendant, and requests the court to enter an order directing the Clerk to issue subpoenas to the witnesses hereinafter named:

(1) A. P. Reynolds, Chairman of Local Board A, El Dorado, Arkansas;

(2) E. H. Mellor, member of the same Board, El Dorado, Arkansas;

(3) B. R. McClannahan, member of the same Board, El Dorado, Arkansas;

(4) S. C. Vinsonhaler, Chairman of Appeal Board No. 2, Little Rock, Arkansas;

(5) Joe K. Mahony, member of Appeal Board No. 2, El Dorado, Arkansas;

(6) Brigadier General Ebenezer L. Compere, Little Rock, Arkansas;

(7) Major Troy W. Lewis, Little Rock, Arkansas.

The testimony of these witnesses is material to the defense urged by the defendant to the indictment, in that defendant shall establish by each of these witnesses that they participated in the classification of the defendant by the Selective Service System and reviewed the defendant's draft board file. Each of said witnesses will testify

6 that all of the evidence considered was reduced to writing; that the undisputed evidence showed that defendant was a duly ordained minister of the Watchtower Bible and Tract Society and of Jehovah's Witnesses, a recognized religious organization under the Act;

that defendant was duly recognized by said organization and regularly performed his duties as such minister by devoting substantially all his time to the furtherance of his missionary evangelistic work at all times involved herein, and that he had dedicated his entire life to the performance of his said duties. Moreover, each of such witnesses shall testify that he did not find any evidence which shows that the defendant was not devoting his full time and had not dedicated his entire life to the performance of his duties as a minister; that each did not find that the defendant fictitiously or falsely claimed to be an ordained minister, and did not find that there was any evidence in the file which contradicted the claim of the defendant that he represented the Watchtower Bible and Tract Society as one of its duly ordained and regularly acting ministers and missionary evangelists; that they cannot show wherein defendant does not fit Opinion No. 14 of the Selective Service System concerning his ministerial status as one of Jehovah's Witnesses, and that the only reason defendant was classified as liable for training and service, and the only reason defendant's claim for exemption as a minister of religion was denied, was because his name did not appear on the certified official list of ministers of the Watchtower Bible and Tract Society circulated by National Headquarters of the Selective Service System to all State Headquarters of said system.

All of this evidence would prove that the Selective
7 Service System had no evidence disputing defend-
ant's claim; that the System acted contrary to the undisputed evidence, in excess of its statutory authority, without jurisdiction, without support of any evidence, contrary to law, contrary to the Selective Service Regulations and the due process clause of the Fifth Amendment; and therefore the order upon which the indictment is based is illegal and void and of no force and effect.

(8) Sam Pryor, Hutting, Arkansas;

(9) Luther Lewis, Strong, Arkansas;

(10) Ethel Snodgrass, Higgins, Missouri—

each of which last named witnesses shall testify that in the fall of 1941 defendant was assigned to El Dorado, Arkansas, to build up a congregation of Jehovah's witnesses by carrying on his full-time missionary evangelistic

work in El Dorado, Arkansas, until October 1942, when he left El Dorado and has since been carrying on his missionary work elsewhere; that during the time he was in El Dorado, Arkansas, he regularly carried on his full-time missionary evangelistic work and acted as a regular and duly ordained minister of the Watchtower Bible and Tract Society and Jehovah's witnesses; that the defendant was looked upon by such persons and other persons in El Dorado as standing in relation to Jehovah's witnesses as the orthodox religious clergy stand toward their congregations, and that the defendant is qualified to perform ceremonies in connection with the discharge of his duties as an ordained minister; that the defendant is as a fact a minister of religion within the meaning of section 5(d) of the Selective Training and Service Act, and is exempt from all statutory duty of training and service; that such evidence relates to whether or not the draft board had authority or jurisdiction to induct the defendant for training and service, and the court can receive such evidence de novo as to the exempt status of the defendant in
8 defense to the indictment.

That the above named witnesses will therefore testify to evidence which is material to the defendant's defense to the indictment; that he cannot safely go to trial without such witnesses; that such witnesses are not within the district or within one hundred miles of the place of trial, and defendant is not possessed of sufficient means and is actually unable to pay the fees of such witnesses for travel from Arkansas and Missouri to Sioux Falls, South Dakota, for trial, and that he greatly needs such witnesses.

Wherefore defendant prays that the court render an order to the Clerk directing that such witnesses be subpoenaed in Arkansas and Missouri, commanding them to appear before this court on February 13, 1945, to give evidence in behalf of the defendant. Defendant further prays that the fees of such witnesses be paid in the same

manner that similar costs and fees are paid to witnesses subpoenaed in behalf of the United States of America.

Taze Hamrick Gibson,
TAZE HAMRICK GIBSON, *Defendant.*

HAYDEN C. COVINGTON,
Attorney for Defendant.

Sworn to and subscribed before me this 23 day of January 1945:

[NOTARIAL SEAL]
ORPAH DAVIDSON, *Notary Public.*
My commission expires Aug. 2, '45.

10 In United States District Court

[Title omitted.]

Order

Filed Jan. 26, 1945

A Motion for Subpoenas having been filed herein by the above named defendant with the Clerk of this Court; and,

The Clerk having brought the same to the attention of the Court at two o'clock in the afternoon of this day; and,

It appearing to the Court that the said motion is in the form of an affidavit setting forth the names and addresses of certain persons whose evidence is claimed by defendant to be material to his defense; that he cannot safely go to trial without them; and stating what he expects to prove by each of said witnesses; that said witnesses are not within this District, and are not within one hundred miles of the City of Sioux Falls, South Dakota, where it is proposed to try said case; and

It appearing that defendant is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses; and

It appearing to the Court from an examination of said Motion for Subpoenas that the testimony of the witnesses sought to be subpoenaed is not competent as a defense to the charge in this case, nor material to any of the issues

herein, and that the said requested witnesses are
11 not within ~~this District~~, nor within one hundred miles of the place of trial; and,

The Court having considered the showing of the defendant, and being fully advised in the premises:

It is therefore ORDERED that the Motion for Subpoenas be, and the same is, hereby denied.

Dated at Sioux Falls, South Dakota, this 26th day of January, 1945.

By the Court:

A. LEE WYMAN, *District Judge.*

Attest:

[SEAL OF COURT]
ROY B. MARKER, *Clerk.*

12 In United States District Court

[Title omitted.]

Motion to quash indictment

Filed Feb. 1, 1945

Now comes the defendant, Taze Hamrick Gibson, by his attorney, Hayden C. Covington, and moves the court to quash the indictment and to order the prosecution dismissed because:

1. The indictment fails to state an offense against the laws of the United States.

2. The indictment is insufficient to state an offense.

3. The indictment fails definitely and sufficiently to advise the defendant of the nature of the offense charged.

4. The criminal sanctions clause of section 11 of the Selective Training and Service Act, and Regulations thereunder, requiring the defendant to comply with the order to report for work of national importance, have been construed by the courts so as to require the defendant (who has been examined on a preinduction physical examination and declared acceptable and who has exhausted his administrative remedies by complying with and submitting to the selective process through his reporting at the specified Civilian Public Service Camp at Hill City, South Dakota, but who there refused to perform said work of national importance after being examined at said camp) as a con-

dition precedent to testing the invalidity of the classification to submit to the terms of the order to report pursuant to the illegal order upon which the indictment is based, a vain and needless thing or act.

5. The construction of the Act and Regulations penalizes the defendant for having failed to submit to the order by denying him the right to show that the
13 order is invalid because of defendant's exemption from duty under the Act as a minister of religion, thus making said Act and Regulations thereunder unconstitutional and void for each of the following reasons, to wit:

(a) They constitute a bill of attainder, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

(b) They transfer and surrender the judicial power of the United States Courts to the draft boards, in the trial of a criminal case, so as to permit said boards to determine the guilt of the defendant, a judicial function, contrary to Article III of the Federal Constitution.

(c) They abridge the right of the defendant to have a judicial trial and deny him the right to prove his innocence, and also his right to be heard in his defense, contrary to the due process clause of the Fifth Amendment to the Federal Constitution.

(d) They deny and abridge the right of the defendant to a trial by jury and the privilege of having a jury pass on whether the defendant owes a duty because exempt and whether he is guilty of failing to perform a duty, contrary to the provisions of the Federal Constitution guaranteeing a trial by jury and to the Sixth Amendment forbidding the denial thereof.

(e) They permit conviction without evidence or upon hearsay evidence, and deny the defendant the right of counsel in his defense, contrary to the Fifth and Sixth Amendments to the Federal Constitution.

(f) They permit the draft boards to determine the guilt of the defendant who is exempt and could not be found guilty of violating a duty under the Act, and thereby the Act and Regulations are converted into an *ex post facto* law, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

6. The indictment is void because it was obtained by the district attorney, returned by the grand jury, received and filed by the court, in violation of Article 3, Section 2, clause 3 of the United States Constitution and the Sixth Amendment to the United States Constitution, requiring that this defendant in this criminal action shall be tried in the district in which the crime was committed; and the alleged offense, if any, in this case was not committed within the federal district of South Dakota but in the federal western district of Arkansas, as appears from the facts set forth herein and in defendant's affidavit submitted herewith.

7. The Selective Training and Service Act of 1940, as amended, and the Regulations thereunder, under
14 which the indictment herein was returned, are null and void and unconstitutional, because the Supreme Court of the United States has construed and applied the same to require the defendant, a registrant under the Act, to report at a Civilian Public Service Camp at Hill City, South Dakota, in order to exhaust his remedies under the Act, which camp is more than one hundred miles from Eldorado, Arkansas, the place where defendant registered and where the draft board is situated. Said construction has unlawfully authorized the Government of the United States to institute a prosecution in the District of South Dakota, which is not the district where the controversy arose, or where the draft board is situated, or where the order on which the indictment is based was issued, or where the alleged crime was committed. Thereby defendant is subjected to serious hardships upon the trial in this district. He is forced to go to trial at a place remote from his home, remote from Arkansas, the place where the controversy arose and which is the place where all the witnesses are situated. Such construction of the Act and Regulations requiring defendant to report at Hill City, South Dakota, to exhaust his administrative remedies denies and deprives defendant of a fair and full trial because he shall be unable to bring his witnesses all the way from Arkansas to South Dakota to testify as to his defenses and the issues, since defendant is an indigent person and said witnesses reside more than one hundred miles from the place of trial. Said construction permitting

such hardships is unreasonable, arbitrary and capricious, and deprives defendant of his rights and liberty contrary to Article III, Section 2, clause 3 of the United States Constitution and the Fifth and Sixth Amendments to the United States Constitution.

Wherefore, the indictment being insufficient and the law being unconstitutional and void as construed, it will not support a prosecution. Accordingly, the indictment should be quashed and dismissed with an order discharging the defendant from all liability. Defendant prays for such other and further relief to which he may justly be entitled in the premises.

Hayden C. Covington,
HAYDEN C. COVINGTON,
Attorney for Defendant.

Office and P. O. Address: 117 Adams Street, Brooklyn 1, New York. Telephone Triangle 5-1474.

In United States District Court

[Title omitted.]

Defendant's affidavit

Filed Feb. 1, 1943

STATE OF INDIANA, *County of Vermillion, ss:*

Taze Hamrick Gibson, being duly sworn upon oath, deposes and says:

1. That he is temporarily staying at Clinton, Indiana, is a citizen of the State of Mississippi and is the defendant in the above entitled and numbered action in which the attached motion to quash shall be filed. That he makes this affidavit to support said motion to quash.

2. That he registered pursuant to the Selective Training and Service Act of 1940, as amended, in 1942, with Local Board A of the Selective Service System at El Dorado, Arkansas. He filed his questionnaire in October 1942 showing that he was duly ordained minister regularly performing his duties as such in behalf of Jehovah's witnesses and the Watch Tower Bible and Tract Society.

3. On November 6, 1942 he was unlawfully classified in

class I-A by said local board making him liable for training and service, and arbitrarily denying his claim for exemption as a minister. On May 8, 1943 he was classified by the Board of Appeal in class IV-E, making him liable for work of national importance as a conscientious objector and arbitrarily denying his claim for exemption as a minister of religion under the Act and Regulations. He thereafter duly applied to the State and National Directors of Selective Service for action in his behalf.
17 They were requested to take an appeal to the President and grant him his claim for exemption as a minister of religion under the Act. They declined to take action.

4. Thereafter defendant was ordered to report for work of national importance at a Civilian Public Service Camp situated at Hill City, South Dakota, on August 21, 1944. He reported to the camp pursuant to the Act and Regulations and the opinion of the Supreme Court of the United States in Falbo v. United States, 320 U. S. 549, to exhaust his administrative remedies under the Act by taking the physical examination in order to challenge the legality of the draft board's action in the courts of the United States. He was not examined and accepted at the camp until on or about August 28, 1944, at which time he left the camp when he had completed his administrative remedies.

5. The order to report to do work of national importance at the camp at Hill City, South Dakota, was issued by Local Board A of Eldorado, Arkansas, and it was upon this order that the examination for acceptance at the camp was made. The alleged duty of the defendant to stay at the camp was based upon this said order issued by Local Board A of Eldorado, Arkansas. Therefore the violation of the Act and Regulations alleged in the indictment is based upon this order to report for work of national importance. Accordingly, the violation, if any, of the Act charged by the indictment was committed by the defendant in the federal district of Arkansas, the place where the board was situated, the place where the controversy arose, the place where the witnesses as to plaintiff's duty under the Act and Regulations reside and which is properly the only place to try the liability, if any, of the defendant under the Act and Regulations.

18 6. The indictment is void because it was obtained by the district attorney, returned by the grand jury, received and filed by the court, in violation of Article 3, Section 2, clause 3 of the United States Constitution and the Sixth Amendment to the United States Constitution, requiring that this defendant in this criminal action shall be tried in the district in which the crime was committed; and the alleged offense, if any, in this case was not committed within the federal district of South Dakota but in the federal western district of Arkansas, as appears from the facts herein set forth.

7. The Selective Training and Service Act of 1940, as amended, and the Regulations thereunder, under which the indictment herein was returned, are null and void and unconstitutional, because the Supreme Court of the United States has construed and applied the same to require the defendant, a registrant under the Act, to report at a Civilian Public Service Camp at Hill City, South Dakota, in order to exhaust his remedies under the Act, which camp is more than one hundred miles from Eldorado, Arkansas, the place where defendant registered and where the draft board is situated. Said construction has unlawfully authorized the Government of the United States to institute a prosecution in the District of South Dakota, which is not the district where the controversy arose, where the draft board is situated, where the order on which the indictment is based was issued and where the alleged crime was committed. Thereby defendant is subjected to serious hardships upon the trial in this district. He is forced to go to trial at a place remote from his home, remote from Arkansas, the place where the controversy arose and which is the place where all the witnesses are situated. Such construction of the Act and Reg-

19 ulations requiring defendant to report at Hill City, South Dakota, to exhaust his administrative remedies denies and deprives defendant of a fair and full trial because he shall be unable to bring his witnesses all the way from Arkansas to South Dakota to testify as to his defenses and the issues, since defendant is an indigent person and said witnesses reside more than one hundred miles from the place of trial. Said construction permitting such hardships is unreasonable, arbitrary and capri-

cious, and deprives defendant of his rights and liberty contrary to Article 3, Section 2, clause 3 of the United States Constitution and to the Fifth and Sixth Amendments to the United States Constitution. Therefore the United States Attorney had no authority to obtain the indictment from the grand jury in this district; the grand jury had no authority to receive and file an indictment returned in this district, because the alleged offense was not committed in the federal district of South Dakota. The controversy upon which the indictment is based arose in the federal western district and State of Arkansas. Defendant was exempt from all training and service under the Act and Regulations because he was a minister of religion within the meaning of Section 5 (d) of the Act. Under the Act and Regulations all that required of him to do so was to register, inasmuch as he was a minister. Defendant duly exhausted all of his remedies of appeal, provided for in the Regulations. Upon the trial it shall be necessary to summon witnesses from Eldorado, Arkansas, more than one hundred miles from the place of trial. Among several witnesses there shall be the members of the local draft board A of Eldorado, Arkansas, the clerk of said board, members of the board of appeal and the State Director of Selective Service System for the State of Arkansas.

20 8. The controversy between the United States of America and the defendant arose in the federal western district of Arkansas. It is there that the order upon which the indictment is based was issued. Defendant did not report to the camp at Hill City, South Dakota, for the purpose of performing work of national importance, but he reported there for the sole purpose of exhausting his administrative remedies by undergoing a physical examination to determine whether or not he was acceptable. He was examined and declared acceptable and immediately left the camp. He reported to camp to comply with the technicalities of the law to complete the selective process. Therefore it is apparent from the foregoing that any alleged crime was committed, if at all, in the federal western district of Arkansas, where the local board is situated, where all the witnesses for the Government and the defendant are located. The liability of defendant

under the Act is not triable in the district of South Dakota. Since Congress in the Act has not provided for the venue and place of trial of alleged violators in states where registrants report for the purpose of exhausting their administrative remedies, it must be assumed that Congress intended that a registrant should be tried for an alleged violation of the Act in the federal district where the draft board was located, in the district where the controversy arose, and in the district where the order upon which the indictment is based was issued, which is the western district of Arkansas. Accordingly, the indictment herein is void because it was returned in violation of Article 3, Section 2, clause 3, of the United States Constitution and the Sixth Amendment to the United States Constitution, which require that a defendant in a criminal case shall be tried in the district wherein the crime shall have been committed, which was only within the western district of Arkansas, and which is the only district where the defendant can lawfully be indicted and tried.

Taze Hamrick Gibson.
TAZE HAMRICK GIBSON.

Sworn to and subscribed before me this 27th day of December 1944.

[NOTARY SEAL] E. E. NEEL, *Notary Public.*
My commission expires June 29, 1947.

In United States District Court

[Title omitted.]

Motion for dismissal of the indictment and for judgment of acquittal

Filed Feb. 13, 1945

Now comes the defendant at the close of all the evidence when both parties have announced that they rest their respective cases, and before the court announces its decision, and requests the court to dismiss the indictment and enter a judgment of acquittal, for each of the following reasons:

1. The government has wholly failed to prove a case against the defendant under the indictment.

2. There is no evidence to show that the defendant violated the Act as charged in the Indictment.

3. The overwhelming preponderance of the evidence and the undisputed evidence shows that the defendant is not guilty as charged in the indictment.

4. Acceptance by the armed forces upon the preinduction physical examination and the subsequent appearance of defendant at the local board and at the Civilian Public Service camp, completes the administrative process so as to permit judicial review of the illegal classification in defense to the indictment, based on his failure to remain at the CPS camp, and therefore the defendant is entitled to have the court consider the following defenses, that the classification and order on which the indictment was based were void.

5. It is not necessary for defendant voluntarily to stay at the Civilian Public Service camp and become a CPS worker as an assignee in compliance with the order, because such is to require defendant to perform a vain, idle and immaterial act as a condition precedent to judicial review of the illegal classification.

6. The undisputed evidence before the boards and before this court establishes that the defendant was exempt from all training and service under the Selective Training and Service Act because a duly ordained minister of religion under section 5 (d) of the Act and section 622.44 of the Regulations promulgated thereunder, and there was no substantial evidence that he was not exempt under the terms of the Act and Regulations; therefore the final classification and the orders based thereon were without authority of law, in excess of the jurisdiction of the draft boards and of the camp authorities, arbitrary and capricious, without support of substantial evidence, contrary to law, contrary to the Act and Regulations, contrary to the Constitution by denying defendant of his rights and liberty without due process of law.

7. There is no evidence showing that defendant is not a minister of religion as claimed, no evidence that he fictitiously claimed to be a minister, and no evidence showing that he was not exempt as a minister, and the undisputed

evidence before the boards showed that he was a minister of religion duly and regularly performing his duties as such at all times herein, and that he was exempt as such under the Act and Regulations. Moreover, the evidence shows that the boards denied his claim for exemption upon a fictitious, arbitrary and capricious ground which was whether defendant's name appeared on a cer-
25 tified official list of ministers filed with Selective Service National Headquarters. Furthermore, the boards did not follow Opinion No. 14 of Selective Service National Headquarters in classifying defendant. Moreover, there is no evidence to sustain the action of the draft boards in this case. By reason thereof, the orders of the local board are void, illegal and contrary to law, and the order of the camp authorities which defendant is charged with violating is without legal force and effect.

8. The order upon which the indictment is based is void because the administrative agency denied defendant a fair and full hearing, did not consider evidence, ignored all evidence showing defendant was exempt, refused to consider evidence showing defendant was exempt, violated defendant's procedural rights, all of which action denied defendant his rights of due process and liberty, contrary to the Fifth Amendment to the United States Constitution.

9. The undisputed evidence before the boards and this court establishes that defendant is a minister of religion, exempt from all duty of training and service under the Act and Regulations and that the boards violated the due process clause and denied defendant his rights and liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution.

10. The undisputed evidence before the boards and this court establishes that defendant is a minister of religion, exempt from all duty of training and service under the Act and Regulations and that the boards violated the due process clause of the Fifth Amendment by denying defendant a full and fair hearing, by ignoring and rejecting the undisputed evidence which defendant offered to the local board showing that he was exempt from all training and service under the Act.

11. The construction placed upon the Act and
26 Regulations by the court requiring the defendant to remain at the Civilian Public Service Camp and

apply for a writ of habeas corpus as the only remedy and means of challenging the validity of the orders on which the indictment is based, deprives defendant of his constitutional rights. Moreover, the court's denial of defendant's efforts to prove in defense to the indictment that the action of the administrative agency is void because he is exempt as a minister of religion denied defendant his rights to a full trial of his defenses under the law in violation of the due process clause of the Fifth Amendment, denied him his right to a judicial trial and judicial inquiry as to the administrative action contrary to the Third Article of the United States Constitution, and thereby the Act and Regulations have been converted into a Bill of Attainder contrary to the First Article, section 9, clause 3, of the United States Constitution.

12. The criminal sanctions clause of Section 11 of the Act and Regulations promulgated thereunder have been construed by the court and applied to the facts in this case so as to penalize the defendant for claiming his rights and refusing to stay at the Civilian Public Service camp in compliance with a void order, and thereby the Act and Regulations have been converted into a Bill of Attainder contrary to the First Article, section 9, clause 3, of the United States Constitution; such construction transfers and surrenders the judicial power of the United States Courts to the administrative agency contrary to the Third Article of the United States Constitution, abridges and denies defendant his right to prove his innocence contrary to the Fifth Amendment to the Constitution, permits the conviction without evidence and upon hearsay evidence,
27 and denies defendant the right to counsel because he is not allowed counsel before the local board, which is the exclusive agency for determining guilt of defendant under the Act, all contrary to the Fifth and Sixth Amendments to the United States Constitution.

Wherefore defendant prays that, upon consideration hereof, the court find the defendant not guilty, dismiss the indictment, render and enter a judgment of acquittal, and direct that the defendant be discharged. The defendant

prays for such other and further relief to which he may show himself to be justly entitled.

Hayden C. Covington,
HAYDEN C. COVINGTON,
Attorney for Defendant.

100 And afterwards, to wit, on the 14th day of February A. D. 1945, there was filed in the office of the clerk of said court, Order overruling Motion to Quash Indictment; which said Order is in words and figures the following, to wit:

101 In United States District Court

[Title omitted.]

Order overruling defendant's motion to quash the indictment

Filed Feb. 14, 1945

On this the 13th day of February A. D. 1945 duly came on to be heard the defendant's motion to quash the indictment, which was timely filed and urged by the defendant.

The Court, after hearing argument of counsel thereon and being duly advised in the premises, is of the opinion that the motion should be in all things overruled.

Accordingly, it is hereby ordered, adjudged, and decreed by the Court that the defendant's motion to quash the indictment be and is hereby in all things overruled by the court, to which action of the Court the defendant in open court duly excepted.

A. LEE WYMAN,
United States District Judge.

Attest:
[SEAL OF COURT] ROY B. MARKER, *Clerk.*

102 In United States District Court

[Title omitted.]

Order overruling defendant's motion for dismissal of the indictment and for a judgment of acquittal

Filed Feb. 14, 1945

On this the 13th day of February A. D. 1945 duly came on to be heard the defendant's motion for dismissal of the indictment and for a judgment of acquittal, which was duly filed at the close of all the evidence and before the Court announced the findings of fact and conclusions of law, and

The Court, after hearing argument of counsel thereon and being duly advised in the premises, is of the opinion that the motion should be in all things overruled.

Accordingly, it is hereby ordered, adjudged, and decreed by the Court that the defendant's motion for dismissal of the indictment and for a judgment of acquittal be and is hereby in all things overruled by the Court, to which action of the Court the defendant in open court duly excepted.

A. LEE WYMAN,
United States District Judge.

Attest:
[SEAL OF COURT] ROY B. MARKER, *Clerk.*

104 In United States District Court

[Title omitted.]

Findings of fact

Filed Feb. 14, 1945

This matter having come on regularly for hearing before the Court at Sioux Falls, South Dakota, on the 13th day of February 1945, before the Hon. A. Lee Wyman, United States District Judge, the plaintiff being represented by George Philip, United States Attorney for the District of South Dakota, and the defendant, Taze Hamrick Gibson, being present in Court, and being represented by Hayden Covington, his counsel, and

Certain Stipulations of Fact having been made and witnesses called, and the Court being advised in the premises makes the following—

FINDINGS OF FACT

I

The defendant, Taze Hamrick Gibson was born in Meridian, Mississippi, on September 14th, 1922, and is now twenty-two years of age. He registered under the Selective Training and Service Act of 1940 with Local Board A, Union County, El Dorado, Arkansas, in September of 1942. Following his registration a selective service questionnaire was sent to him on October 5th, 1942. The said questionnaire was returned to the local board by the defendant fully executed on October 12th, 1942. In such questionnaire the defendant claimed to be a minister of religion, a minister of Jehovah's Witnesses. On
105 November 6th, 1942, the said local board classified him 1–A. From that classification on November 12th, 1942, he appealed to the Board of Appeal, which board classified him 4–E. He was notified of this action of the board. Other appeal proceedings were had, but the 4–E classification was continued and still continues.

II

Acting on such 4–E classification, General Hershey, Director of Selective Service System, on May 23rd, 1944, made an order directed to the State Director of Illinois, to whose jurisdiction the case of Taze Hamrick Gibson had been transferred by the said local board at El Dorado, Arkansas, assigning this defendant to Civilian Public Service Camp No. 57, at Hill City, Pennington County, South Dakota, and ordering that the proper local board make the necessary order to the defendant to report for work of national importance.

III

The order to this defendant to report for work of national importance accordingly was made on August 8th, 1944, ordering him to appear and report at Civilian Public

Service Camp No. 57, at Hill City, South Dakota, on August 21st, 1944. He reported at said camp pursuant to such order and was there enrolled on or about August 23rd, 1944, and was given a pre-induction medical examination, which examination showed him fit for such service.

IV

The testimony shows, and the Court so finds, that the defendant did not go to said camp for the purpose of remaining there in conformity to the said order and the law, and that it was his intention when he went there not to stay at said camp.

106 V

Without any authority and in violation of the rules and regulations prescribed under the Selective Training and Service Act, and particularly Section 653.12 of the Selective Service Regulations, on August 28th 1944, the defendant left the said camp permanently. He deserted the camp.

Wherefore, the Court finds the defendant guilty as charged in the indictment and returns and files its verdict accordingly.

Dated at Sioux Falls, South Dakota, this 14th day of February, 1945.

By the Court:

A. LEE WYMAN, *Judge.*

Attest:

[SEAL OF COURT] ROY B. MARKER, *Clerk.*

107 In United States District Court

[Title omitted.]

Defendant's exceptions to the findings of fact and conclusions of law filed by the Court

Filed Feb. 14, 1945

To said Honorable Court:

Now comes the defendant, Taze Hamrick Gibson, in the above entitled and numbered cause and files and presents

this his exceptions and objections to the findings of fact and conclusions of law filed by the Court herein.
The defendant shows unto the court:

That the findings of fact that the defendant had a duty under the Act to stay at said camp and violated said duty by departing from said camp and the conclusion that the defendant's acts and conduct constituted a violation of the Selective Training and Service Act of 1940 is excepted to because contrary to the facts and law applicable to this case.

Moreover defendant excepts to said findings of fact and conclusion of law for the reason that the same do not cover all the issues involved in this case and the Court is now requested to make findings of fact and conclusions of law as requested by the defendant in his requests for findings of fact and conclusions of law numbers 1 to 27, inclusive. The Court's findings and conclusions are excepted to for failure to find and conclude as requested by the defendant in his said requests.

108 Wherefore, defendant objects and excepts to the findings of fact and conclusions of law filed by the Court herein.

HAYDEN C. COVINGTON,
Attorney for Defendant,
117 Adams Street, Brooklyn, New York.

109 In United States District Court

[Title omitted.]

Verdict by the court

Filed Feb. 14, 1945

This matter having been regularly heard by the Court at Sioux Falls, South Dakota, on the 13th day of February 1945, before A. Lee Wyman, United States District Judge; the plaintiff being represented by George Philip, United States Attorney; and the defendant, Taze Hamrick Gibson, being present in Court, and being represented by Hayden Covington, his counsel; and

The defendant, Taze Hamrick Gibson, having been fully advised as to his constitutional rights; having entered a

plea of not guilty; having duly waived his right of trial by jury by written waiver filed herein; and having consented in writing to be tried by the Court; and,

The plaintiff having consented in writing thereto; and

The Court having heard all the evidence and arguments of counsel, and being fully advised in the premises, hereby reports its verdict, finding the defendant guilty as charged in the indictment.

Dated February 14th, 1945.

By the Court:

A. LEE WYMAN, *Judge.*

110 Attest:

[SEAL OF COURT] ROY B. MARKER, *Clerk.*

111 In District Court of the United States, District of South Dakota, Western Division, at Sioux Falls

No. 3049 W. D. Criminal Indictment in one count for violation of U. S. C. A. Title 50, Sec. 311

UNITED STATES

v.

TAZE HAMRICK GIBSON

Judgment and sentence

Filed Feb. 14, 1945

On this 14th day of February 1945, came the United States Attorney and the defendant, Taze Hamrick Gibson, appearing in proper person and by counsel, and having been advised of his constitutional right of a trial by a jury, and having waived trial by a jury in writing, and

The defendant having been convicted upon a finding of guilty by the Court and the Court thereupon entering a verdict of guilty of the offense charged in the indictment in the above entitled cause, to wit: unlawfully leaving a Civilian Public Service Camp under the Selective Training and Service Act of 1940 with intent to remain permanently away from said camp, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no

sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five years.

112 It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

By the Court:

A. LEE WYMAN,
United States District Judge.

Attest:
[SEAL OF COURT] ROY B. MARKER, *Clerk.*

113 In United States District Court

[Title omitted.]

Notice of and grounds for appeal

Filed Feb. 14, 1945

Name and address of appellant is: Taze Hamrick Gibson, 1602 South Fourth Street, Clinton, Indiana.

Name and address of appellant's attorney is: Hayden C. Covington, 117 Adams Street, Brooklyn 1, New York.

The offense with which the defendant is charged is an alleged violation of Section 11 of the Selective Training and Service Act of 1940, as amended.

The date of the judgment is February 14, 1945.

A brief description of the judgment or sentence is: Five (5) years from February 14, 1945 in the custody of the Attorney General at such place as may be designated by the Attorney General.

Defendant-appellant is now in the custody of the United States Marshal for the District of South Dakota and confined in the County Jail at Sioux Falls, South Dakota.

I, the above named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment above-mentioned, on the grounds set forth below:

Grounds for appeal

1. The court erred in overruling defendant's mo-
114 tion to quash the indictment.

2. The court erred in holding that the defendant could not show in defense to the indictment that the orders of the administrative agency upon which the indictment is based were void, illegal and contrary to the Act, the Regulations and the Constitution of the United States.

3. The court erred in holding that the defendant could not show in defense to the indictment that he had no duty for training and service under the Act and Regulations because he was exempt as a minister of religion under Section 5 (d) of the Act.

4. The court erred in excluding from the evidence the contents of the defendant's draft board file which showed that he had no duty for training and service under the Act and Regulations because they showed, without dispute, that the defendant was a minister of religion under the Act and Regulations.

5. The court erred in excluding from the evidence the contents of the defendant's draft board file which showed that the administrative agency had acted arbitrarily, capriciously, contrary to law, contrary to the Act, contrary to the Regulations, contrary to the evidence, without evidence, in violation of the Act, and deprived defendant of his rights contrary to the due process clause of the Fifth Amendment to the United States Constitution.

6. The court erred in excluding oral testimony of the defendant and his witness offered by the defendant as to defendant's ordination and full time activity as a minister of the gospel which showed that defendant was exempt
115 from all duty of training and service under the Act and therefore that the boards did not have jurisdiction or authority to order him to do work of national importance in a civilian public service camp.

7. The court erred in failing and refusing to grant defendant's motion for dismissal of the indictment and for a judgment of acquittal duly and timely urged at the close of all the evidence.

8. The court erred in failing and refusing to grant defendant's requests for findings of fact and conclusions of law duly filed at the close of all the evidence.

9. The court erred in making the findings of fact, the general finding of guilty as charged in the indictment and the conclusions of law based upon such findings of fact.

10. The court erred in rendering and in entering a judgment against the defendant and in sentencing the defendant.

11. The court erred in construing the Act and Regulations so as to deny the defendant the opportunity to defend to the indictment on the grounds that he had no duty for training and service because a minister of religion under Section 5 (d) of the Act. Such construction converts the Act and the Regulations into a bill of attainder contrary to clause 3, Section 9 of Article One of the United States Constitution, deprives the defendant of a judicial trial contrary to Article Three of the United States Constitution, and denies the defendant of his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution.

12. For other grounds apparent upon the face of the record and appearing in the bills of exceptions to be hereafter filed.

13. For other grounds to be subsequently assigned
116 and set out in the Assignments of Error which shall be filed with the Clerk of this Court.

Taze Hamrick Gibson,
TAZE HAMRICK GIBSON,
Defendant-Appellant.

Hayden C. Covington,
HAYDEN C. COVINGTON,
Attorney for Defendant-Appellant,
117 Adams Street, Brooklyn, New York.

Dated and filed with the Clerk on February 14, 1945.

Service admitted Feby. 14, 1945.

GEORGE PHILIP,
United States Attorney.

117 In the District Court of the United States for the District of South Dakota

Criminal No. 3049 W

UNITED STATES OF AMERICA, PLAINTIFF

vs.

TAZE HAMRICK GIBSON, DEFENDANT

Bill of exceptions

Filed Feb. 23, 1945

Be it remembered that on the trial of this cause, in said court, at the October 1944 term thereof, the Honorable A. Lee Wyman, Judge of said court, presiding, the following proceedings were had, to wit:

119 [Title omitted.]

Before Hon. A. LEE WYMAN, District Judge

The above entitled matter came on for trial before the Court, at Sioux Falls, Minnehaha County, South Dakota, at 10:00 o'clock in the forenoon, on the 13th day of February, A. D. 1945.

Hon. George Philip, United States Attorney, appeared as counsel for the government.

Hayden C. Covington, Esq., of Brooklyn, New York, appeared as counsel for the defendant.

Proceedings were had as follows:

Mr. PHILIP. This is the case of the United States of America against Taze Hamrick Gibson. This is a Western Division case, and I have an application from the defendant to change the place of trial to the Southern Division, which I wish to file.

The COURT. Very well.

Mr. PHILIP. I now move the arraignment of the defendant.

The COURT. Proceed.

120 Mr. PHILIP. Your right name is Taze Hamrick Gibson?

DEFENDANT. Yes.

Mr. PHILIP. Mr. Covington is your attorney?

DEFENDANT. Yes.

MR. PHILIP. I assume that you have been fully informed as to your constitutional rights?

Mr. COVINGTON. I have informed him as to his constitutional rights and the major facts of the indictment.

Mr. PHILIP. The rules require that I read the indictment, which is as follows:

(Indictment read to defendant.)

Mr. COVINGTON. At this time I would like to call the Court's attention to the defendant's motion to quash.

(Here followed argument by both sides upon defendant's motion to quash.)

Under overruling motion to quash

The COURT. The motion to quash the indictment will be overruled.

Mr. COVINGTON. I except.

The COURT. Exception allowed.

Plea

Mr. PHILIP. Are you ready to plead at this time?

The DEFENDANT. Not guilty.

The COURT. Enter the plea of not guilty.

Stipulation

Mr. PHILIP. We have here a stipulation that the case may be tried at this time in Sioux Falls, and likewise a waiver of trial by jury and the consent by the government to the waiver.

121 Mr. PHILIP. I now move trial of the case of United States of America against Taze Hamrick Gibson.

Mr. COVINGTON. We are ready, Your Honor.

Opening statement

Mr. PHILIP. That puts in issue all of the allegations in the indictment, and in support of the allegations in the indictment the government expects to prove the following. I have gone over these facts with Mr. Covington and in large measure we are agreed.

The government expects to show that this defendant, now on trial, was born in Meridian, Mississippi, on the 14th of September, 1922. He is now 22 years of age. He registered in September, 1942, with Local Board A, Union County, Eldorado, Arkansas. Immediately following his registration a selective service questionnaire was sent to him, on October 5, 1942. The questionnaire was returned to the local board on October 12, 1942. In that questionnaire he claimed to be a minister of religion, a minister of Jehovah Witnesses. On November 6, 1942, the local board classified him 1A. From that classification and on November 12, 1942, he appealed to the State Board of Appeal, which board classified him 4E. He was so notified. Other proceedings were had but the 4E classification was continued, and still remains. Acting on that classification, General Hershey, Director of the Selective Service System, on May 23, 1944, made an order, directed to the State Director of Illinois, to whose jurisdiction the case of Taze Hamrick Gibson had been transferred by the board at Eldorado, Arkansas, assigning this de-
122 fendant to Civilian Public Service Camp No. 57, at Hill City, Pennington County, South Dakota, and ordering that the proper local board make the necessary order to the defendant to report for work of national importance. The order to this defendant accordingly was made on August 8, 1944, ordering him to appear and report at the camp on August 21, 1944. He reported at the camp pursuant to that order, and was there enrolled on or about August 23, 1944.

Mr. COVINGTON. We so agree that those facts stated by the government are true and correct.

Mr. PHILIP. If it is alright I would like to have the defendant also state.

The DEFENDANT. I so agree.

Mr. PHILIP. Pursuing the statement. Without any authority and in violation of the rules and regulations, on August 28, 1944, he left the camp permanently. He deserted from the camp. That is the charge here. The defendant pleaded not guilty. Stripped of all verbiage, that is the issue and the only issue. If the government proves the foregoing facts the Court will be asked to find and return a verdict of guilty.

The COURT. Under the issues, then, as I understand it, in view of that portion of the facts just stated that are admitted, the only issue that the government will be required to prove is that he left the camp without authority?

Mr. PHILIP. That is my understanding.

123 Mr. COVINGTON. I do not so understand. I believe there is an element of being able to prove he did it wilfully and knowingly, and furthermore, I still take the view that the orders upon which the camp assumed jurisdiction are void because first, the man is exempt from all training and service by act of Congress. They had no authority. We expect to show in defense to this indictment those facts which would show the invalidity of that order. We do disagree with Mr. Philip as to the matter at issue presently in this case. We say it is much broader.

The COURT. In asking the question which I asked, I didn't expect to elicit agreement with that understanding. I don't want the record to show that you necessarily agree with my construction of the law.

(Government's Exhibits 1, 2 and 3, marked for Identification.)

Mr. PHILIP. The government offers in evidence, Government's Exhibit 1, the questionnaire; Exhibit 2, the assignment; Exhibit 3, the order to report.

Mr. COVINGTON. No objection.

The COURT. Received.

124 ATLEE BEECHY, being called as a witness by the government, and affirming that he would tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. PHILIP:

Q. Your name is Atlee Beechy?

A. It is.

Q. Are you the Director of Civilian Public Service Camp No. 57, at Hill City?

A. I am at the present time.

Q. How long have you been such director?

A. I came to this camp October 16, 1944.

Q. That was after the offense tried here had transpired?

A. Yes.

Q. Did you succeed Mr. Tschetter?

A. That is right.

Q. Did you have a file in your office relating to Taze Hamrick Gibson, this defendant?

A. We do.

Q. Is that file which you have in your hand; that file?

A. It is.

Q. It is one that was made at a time when your predecessor was in charge of the office?

A. It was.

125 Q. You, as director, became the custodian of those records which you have brought into court?

A. Yes.

Q. And you hold them now?

A. Yes.

Q. Are they now in the same conditions in which they came to you?

A. Yes.

Mr. PHILIP. That is all.

Mr. COVINGTON. No cross-examination.

126 HOWELL TSCHETTER, being called as a witness by the government, and affirming that he would tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. PHILIP:

Q. You may state your name?

A. Howell Tschetter.

Q. Where do you live now?

A. My present home is at Denver, Colorado.

Q. Was there a time when you were the director of Civilian Public Service Camp No. 57, at Hill City, in this state?

A. Yes, there was.

Q. When did you become such director and how long did that situation continue?

A. I became director of this camp on the 19th of October 1942, and continued until September 15, 1944.

Q. You were, then, director of that camp on the dates of August 23rd to August 28th, inclusive?

A. I was.

Q. Directing your attention to the gentleman sitting

back of Mr. Covington, that is Mr. Taze Hamrick Gibson. Was he enrolled at that camp at that time?

A. Yes, he was.

Q. I show you here the record which was kept in that office while you were in charge, and which has been
127 produced here by your successor, Mr. Beechy. Will you produce from that file the record or file which shows when this man, Gibson, the defendant, enrolled at the camp? You have produced for me here a copy of an order to report for work of national importance dated August 8, 1944, which is a copy of Exhibit 3, already in evidence. Was that one of the files of that office when you were in charge?

A. Yes, it was.

Q. Pursuant to that order to report for work of national importance, did this defendant appear at the camp?

A. I [illegible] he did.

Q. When was that?

A. On the 23rd of August 1944.

Mr. PHILIP. May we agree that this is a copy of Exhibit 3?

Mr. COVINGTON. Yes; that is the same as Government's Exhibit 3.

Q. Did you have any conversation with this defendant while he was at the camp?

A. Yes, I did.

Q. Will you tell the Court the circumstances under which you had a conversation with him?

A. I was not actually in camp the first three days, I believe, that the defendant was in camp. Oscar Wiebe acted as acting director, and upon my return about noon on the 28th from a trip that I had made to Denver,
128 Mr. Gibson was at the camp and had just returned, I believe, from a physical examination in Hill City, and wanted to have words with me. We talked at length concerning his case, and I think it was in the neighborhood of an hour and a half, something of that kind, and I explained to him as best I could what the consequences would be of his leaving camp, and as I remember it he agreed to the effect that he understood that such would be the case. He then requested of me a statement, signed by myself, which would be an evidence of him having

completed the administrative process, including induction. Such statement I prepared for him and signed. I believe I turned over to him a copy of that statement, or possibly the original, and I have a copy of that statement in this file. I believe that is about the general extent of the conversation.

Q. Did he at that time tell you anything about his intention to leave the camp?

A. Yes, he did.

Q. Was it on his statement that he intended to leave the camp that you advised him about what would be the consequences of that?

A. That is correct.

Q. Did he request you to give him authority to leave the camp?

A. I don't believe that he requested that authority of me, and had he requested it I would have been
129 unable to have given it to him.

Q. Did you or anyone in authority at that camp give him any authority to leave the camp?

A. We did not. That was beyond our power.

Q. And there was no such authority given nor attempted to be given?

A. That is right.

Q. Did the defendant leave the camp at Hill City?

A. Yes, he did.

Q. And left without authority?

A. That is correct.

Q. What did he say to you as to his intention to leave the camp?

A. If I remember rightly the general gist of his statement on that occasion was that he wanted to make a test of the general situation of having been inducted into this camp.

Q. And then he left without authority?

A. That is right.

Mr. PHILIP. Cross-examine.

Cross-examination by Mr. COVINGTON:

Q. Is this a government operated camp?

A. It is not.

Q. By whom is the camp operated under the Selective Training and Service Regulations?

A. The camp is specifically operated by the Men-
130 nonite Central Committee with headquarters at Akron, Pa.

Q. For what length of time has it been thus operated?

A. Since its very beginning, the 19th of October 1942.

Q. Mr. Tschetter, how long had the defendant been at the camp when you got back from your trip to Denver?

A. I think it was a matter of some three days.

Q. When did he take his physical examination to determine his acceptability?

A. I believe it was on the morning of the 28th.

Q. Do you know why the delay?

A. It is customary to have three days conditioning period during which time one of the procedures is the physical examination, and it is not always convenient to take campers in on the first day. So sometimes there is this delay.

Q. Was it not due to the fact that the doctor who customarily gave the physical examination was not in his office until the 28th? Do you recall about that?

A. I have no specific information of that.

Q. Mr. Gibson never did perform any services at the camp, did he?

A. Not to my knowledge.

Q. As a matter of fact he came there, did he not, according to the records, for the purpose of exhausting the administrative remedies. Is that correct?

Mr. PHILIP. That is objected to as improper cross-examination.

131 THE COURT. Sustained.

Q. I show you a copy of a letter which is signed by Paul G. Tschetter, addressed to J. N. Weber, National Service Board, Washington, D. C., to which is attached a copy of a letter from Taze Hamrick Gibson addressed to Paul Tschetter. I will ask you if that is a part of these files which you have identified?

A. It is a part of the files which I have identified.

(Defendant's Exhibit A marked for identification.)

Q. I show you that letter and the form attached to it and ask you what that is, please?

A. This is a cover letter from Washington, D. C., National Headquarters, Selective Service, and the specific branch of the Camp Operation Section, signed by Walter Lindstrom. The second part is Selective Service Form 221, which is the preinduction physical examination.

(Defendant's Exhibit B marked for identification.)

Q. I hand you that and ask you to identify that?

A. This is a part of the personnel record completed on the 24th day of August 1944, and is a form which the camp superintendent, project superintendent, had his secretary execute relative to the previous work Mr. Gibson had done before entering camp.

(Defendant's Exhibit C marked for identification.)

Q. Is there anything in this file to indicate the physical examination that was given him under the direction
132 of this camp at Hill City, South Dakota.

A. There is.

Q. Where is that?

A. On the second page of National Service Board Form 107, is the report of the examination of this Mr. Gibson, signed by E. B. Hulst, who is camp doctor for our camp.

Q. That is the document which you now hold in your hand?

A. That is right.

(Defendant's Exhibit D marked for identification.)

Q. What is that, please?

A. This is the statement that Mr. Gibson asked me to prepare and is signed by me as of August 28, 1944.

(Defendant's Exhibit E marked for identification.)

Q. What is that you hold in your hand?

A. This is a letter prepared by Mr. Gibson and handed me at the time of his induction into camp.

(Defendant's Exhibit F marked for identification.)

Mr. COVINGTON. At this time the defendant offers in evidence Defendant's Exhibits A, B, C, D, E, F.

Mr. PHILIP. To which the government objects as incompetent, irrelevant and immaterial; not within the issues; not tending to serve or make any defense.

Mr. COVINGTON. I can describe them separately. Defendant's Exhibit A, may it please your Honor,
133 is a copy of a letter written to Mr. Tschetter by Weber of the National Service Board, which is a

form of the Selective Service System having to do with the operation of civilian public service camps, and we offer that letter in evidence. It states that the assignee reported to camp for the purpose of completing the administrative process incident to induction. We offer that exhibit. It is a part of the files which the government has made use of in connection with this man's testimony, and we offer this for the purpose of showing the extent to which he was actually in the camp at the time he is alleged to have departed.

The COURT. Your stipulation covers that. I don't think it is material, but I don't think it can do any harm. The objection will be overruled, with the understanding that photostatic copies will be substituted the exhibit will be received.

Mr. COVINGTON. With the same understanding we offer in evidence a letter from the National Headquarters, Selective Service System, dated September 5, 1944, sent to Mr. Lindstrom, to which is attached a copy of preinduction physical examination. The purpose of this letter to the camp was so that your files of this assignee may be completed. We offer that in evidence to show
134 that he was examined.

The COURT. In view of the stipulation I don't see the necessity for that. I don't think it is material at all.

Mr. COVINGTON. This shows acceptance and the preinduction physical examination which is not covered in the stipulation. The stipulation did not mention his being examined.

The COURT. The stipulation mentions the fact he was examined.

Mr. COVINGTON. Does it mention he was examined on preinduction physically?

Mr. PHILIP. No. Nothing said about preinduction physical.

Mr. COVINGTON. We offer in evidence Exhibit B.

Mr. PHILIP. Objected to as wholly immaterial.

The COURT. It will be received.

Mr. COVINGTON. At this time we offer in evidence the personnel record of this camp dated August 24, 1944, showing his background before coming to camp, and his

occupation, and furthermore that he walked out of camp on August 28, 1944, defendant's Exhibit C.

Mr. PHILIP. Same objection.

The COURT. Received.

Mr. COVINGTON. At this time we offer in evidence that part of the camp file marked Defendant's Exhibit
135 D, entitled "Individual Record of Campee", showing the statement of the defendant, Taze Hamrick Gibson, as to his physical condition, and the second page being the certificate of Dr. E. B. Hulst, who is the examining physician, stating his physical condition as of the date of examination. We offer in evidence Exhibit D.

Mr. PHILIP. Same objection.

The COURT. Received.

Mr. COVINGTON. At this time the defendant offers in evidence Exhibit E, which is the statement signed by Mr. Tschetter, dated August 28, 1944, as to the facts concerning his coming to the camp and his leaving the camp.

Mr. PHILIP. Same objection.

The COURT. Received.

Mr. COVINGTON. At this time the defendant offers in evidence Defendant's Exhibit F, which is a letter from Mr. Gibson to Mr. Tschetter, explaining the reasons why he cannot stay at the camp. We offer in evidence Defendant's Exhibit F.

Mr. PHILIP. Objected to as immaterial, and wholly self-serving.

The COURT. I agree with you, but due to the fact there is no jury here the objection will be overruled and the exhibt received.

136 Q. Mr. Tschetter, how long did Mr. Gibson talk to you? I believe he was in the office about an hour and a half?

A. Something of that kind.

Q. Do you recall what the conversation was between the two of you, in substance? I am not asking you to give all of the details or word for word what was said, but, generally what was covered in that conversation, as best you remember at this time?

A. The general gist of the conversation centered around the fact that he came to the camp to complete, as he termed it, the administrative process with regard to induc-

tion, and he was certain that it had been done. I tried to explain to him concerning his walking out, and what the results might be that would follow. That, in essence, is the sum total of the entire conversation.

Q. Do you recall what he said to you?

A. I would not definitely recall.

Q. Approximately. I am not asking you to say exactly. And what you said to him?

A. I belive that what I have said in essence so far is about the general situation. He wanted to get these administrative processes completed and spoke about the reasons why. I read his letter that he had written to me. Many of the reasons he gave were identical to that situation. And then the fact that I explained to him what leaving without absence would generally mean.

137 Q. What did you tell him, if you remember?

A. I believe I referred to the fact that sooner or later it would come to a trial of one kind or another.

Q. Anything else that you recall on that?

A. It is so long ago.

Mr. COVINGTON. That is all.

Redirect examination by Mr. PHILIP:

Q. Did you call his attention to the regulations requiring him to stay in camp?

A. Only as a voluntary situation. I had no authority to enforce his staying in camp by force of any type. Only calling his attention to the situation that he ought to stay in compliance with the order.

Q. That he ought to stay in compliance with the regulations but you had no authority to force him to stay?

A. No.

Q. But you did tell him the regulations required him to stay and that he should do so?

A. I believe I did.

Q. But he left in spite of your advice and suggestions?

A. He left that afternoon.

Q. And I believe you have already stated he was given no authority by anyone to leave?

A. That is right.

Mr. PHILIP. That is all.

Mr. COVINGTON. That is all.

138 JOHN J. MCKENNA, being called as a witness by the government and being duly sworn, testified as follows:

Direct examination by Mr. PHILIP:

Q. You may state your name?
A. John J. McKenna.
Q. Where do you live?
A. My legal residence is in New York state.
Q. Are you acquainted with the defendant?
A. I know the defendant as Taze Hamrick Gibson.
Q. What is your business or profession?
A. Special Agent, Federal Bureau of Investigation.
Q. You are with the F.B.I.?
A. Yes.
Q. Were you with the F.B.I. when you first met the defendant?
A. Yes.
Q. Where?
A. In Terre Haute, Indiana.
Q. Did you have occasion to talk with the defendant in Terre Haute, Indiana?
A. Yes.
Q. Who were present at the time you talked with the defendant there?
A. I talked to him on two different occasions. The first was on December 2nd at Clinton, Indiana. And on December 4th at Terre Haute, Indiana, at which
139 time he and I were there. Also part of the conversation was engaged in by the jailer in Terre Haute county jail in Terre Haute, Indiana.
Q. What was the occasion for your getting acquainted with him or getting in touch with him?
A. I received instructions from my special agent in charge to locate him and take him into custody.
Q. And it was in that connection that you became acquainted with him?
A. Yes.
Q. Was that in connection with this matter now pending?
A. Yes.
Q. Did you have a talk with him?

A. Yes, I did.

Q. Where?

A. At Terre Haute, Indiana.

Q. Any particular place in Terre Haute?

A. In the county jail in Terre Haute.

Q. Did you make a record of the matters you and he discussed?

A. Yes, I did. I made notes of the interview.

Q. And you wrote out a statement of his discussion?

A. Yes.

Q. Did you ask him when you had it completed whether that statement was true?

A. Yes, I did.

140 Q. What did he say as to that?

A. He said it was true.

Q. Did you ask him to sign it?

A. Yes, I did.

Q. Did he sign it or refuse to sign it?

A. He refused to sign it.

Q. Was that after he had told you that the statement was true?

A. Yes.

Q. Have you that statement with you?

A. Yes.

Q. Will you produce that please?

(Government's Exhibit 4 marked for identification.)

Q. I call your attention to this paper that has been marked Government's Exhibit 4, and which you have produced here. Is that the statement which you read to this defendant in the jail at Terre Haute, Indiana, and which he said was true?

A. This is the statement I wrote and he read himself, and then said it was true.

Q. It is the statement that he likewise refused to sign?

A. Yes.

Mr. PHILIP. We offer in evidence Exhibit 4.

Mr. COVINGTON. At this time the defendant objects to this statement for the reason that it is immaterial and incompetent. Furthermore it is prior to the ar-

141 raignment of the defendant and no adequate or sufficient predicate has been laid for the introduction of the exhibit in evidence.

The COURT. You say it is before what?

Mr. COVINGTON. I say no adequate foundation has been established for the introduction of the statement inasmuch at it is testimony by the F.B.I. man as to events that transpired prior to arraignment.

The COURT. I don't think the foundation is sufficient to admit it as a statement of the defendant.

Q. Will you tell the Court what was said between you and Mr. Gibson?

A. May I see my notes?

Q. You may.

Mr. COVINGTON. We would still object to any testimony as to what was said between the two.

The COURT. Objection sustained. There is no foundation laid for any confession on the part of this man. He was in custody and in jail at the time the statement was made. There is no sufficient foundation laid.

Q. Did you tell the defendant that you were making inquiry in regard to the situation in connection with the case that was to come up against him?

Mr. COVINGTON. That will be objected to for the same reason.

The COURT. Overruled.

112 A. Yes, I did discuss the issue with him.

Q. What did you say to him in regard to any statement that he might make?

A. I told him anything he told me, of course, could be used against him in court, anything he told me in the form of a signed statement. During the conversation I asked him why he left the camp; when he left it; whether he knew when he left the camp he was breaking regulations of the selective service system? To which he answered, yes.

Mr. COVINGTON. We object to this testimony and ask now that it be stricken for the reason it violates the ruling of the Court that no sufficient foundation has been laid.

The COURT. It does not require any foundation as to any statements made by the witness to the defendant, but without further foundation the witness would not be authorized in repeating anything which he claims the defendant said to him, because the foundation is insufficient.

Mr. PHILIP. May I inquire of the Court——

The COURT. There has been no showing as to whether or not there was any promises or threats or anything of the kind made to him, whether or not he had to make a statement.

Q. When you talked to the defendant, tell the Court whether you did or did not tell him that this was in
143 connection with the case which was then pending against him in South Dakota?

A. Yes; I did tell him that.

Q. Did you make any promises to him in event that he made statements?

A. No, sir; I did not.

Q. Did you tell him that you would make no promises to him?

A. Yes, I did. I told him he did not have to make a statement to me. That anything he did say to me in the form of a signed statement could be used against him in court. That it was his legal privilege not to make a statement to me if he so desired. I was going to use no force in making him give me a statement.

Q. You told him he did not need to make a statement at all?

A. Yes, I did.

Q. You held out no promises or threats to him?

A. No, sir; I did not.

Q. Did you offer him any kind of inducements to make a statement?

A. No, sir; I did not.

Q. Did he make the statement as far as you could see entirely voluntarily?

A. Yes.

Q. And in answering the questions in the con-
144 versation you had with him?

A. Yes.

Mr. COVINGTON. I want to ask the witness a question.

The COURT. Very well.

By Mr. COVINGTON:

Q. Mr. McKenna, you told him these things before you handed him the statement to sign, did you not?

A. No. I also told him prior to that time.

Q. When did you tell him? After he began to give you this information?

A. On December 2nd, which was Saturday, I went to Clinton, Indiana, to drive Mr. Gibson back from Clinton to Terre Haute. During the conversation we had in the car I told him I would be back Monday to talk to him about the information I wanted to obtain from him. That he didn't have to tell me at that time unless he wanted to, and if he did not plan to talk to me on Monday he could tell me then and I would not come back to see him on Monday. Why we went into that on Saturday afternoon on the drive from Clinton to Terre Haute. It was about fifteen miles.

Q. That was on Saturday?

A. That was on Saturday.

Q. And you came back on Monday and got the statement from him and handed it to him to sign?

A. After obtaining the statement I did hand it to him.

Q. You talked to him about this information and
145 then you handed it, the statement, to him and asked him but he refused to sign it?

A. That is right.

Q. Why did he refuse to sign it?

A. He told me he thought he didn't have to sign the statement, which I told him was true.

Mr. Covington. I say the objection we urged still stands under those circumstances.

The Court. Not as to the conversation he had with him. The conversation is permissible.

By Mr. Philip:

Q. You may tell the Court the conversation you had with the defendant.

A. First of all I asked him where he was born. He told me the date and place of his birth.

Q. What did he say?

A. He was born in Meridian, Mississippi. I asked him when he registered for selective service and where. He told me he registered with Local Board No. 1, at Eldorado, Arkansas.

Q. A, wasn't it?

A. No. 1, he told me. Eldorado, June 30, 1942. That

he was thereafter placed in classification 1A, sometime in September, 1942. Rather, in November, 1942, he was placed 1A. That he thereafter appealed the classification to the Appeal Board No. 2, Little Rock, Arkansas, on the ground he was entitled to 4D classification due
146 to his ministerial duties, and instead of being placed in 4D classification he was placed in 4E classification, which was the designated classification for conscientious objector. He also told me he previously had filed Selective Service Form 57, which was the prescribed form for conscientious objectors, to file to obtain their 4E classification. He told me his purpose in filing that Form 57 was to substantiate his claims as a minister of the gospel and not for the purpose of requesting 4E classification. He was classified, according to the information he told me, in classification 4E on May 8th, 1943, and that he thereafter requested his file to be referred to the National Director of Selective Service, which was done on or about September 1, 1943, and that he thereafter received notice from his draft board to report for physical examination at his local board on September 7, 1943. That he thereafter received notice to take another physical examination in Chicago, Illinois, on September 22nd, 1943. That he went to Chicago and took the physical, and that as far as he knew he was still being maintained in 4E classification. In June, 1944, he told me, he received notice from his draft board to report to Carlinsville, Illinois, for delivery to Public Service Camp 57, Hill City, South Dakota. That he thereafter contacted his draft board and again requested another physical which was granted him.

Mr. Covington. Wouldn't it be better for the
147 witness to testify rather than read from the statement?

The Court. Yes. Of course he has a right to refresh his recollection but he should not read the statement.

A. (Con't.) That he thereafter went into Chicago on July 25, 1944 for a physical examination. That he later received orders to report to Public Service Camp 57, Hill City. That he did report on August 23, 1944, and that upon arriving at the camp he presented Mr. Tschetter with a two page statement. We didn't go into what the statement involved. I didn't ask him what the statement

was. On August 28, 1944, he left the camp. At the time he left he knew it was against——

Mr. COVINGTON. Just a minute. That is a conclusion.

The COURT. It is part of the conversation.

A. (Con't.) I asked him whether he knew he was violating a rule of the Selective Service System. He said, Yes, he did. I asked him if he knew his actions were in violation of the selective service regulations. He said he did know it but he left with the intention of permanently remaining away from that camp.

Mr. PHILIP. Cross examine.

Cross-examination by Mr. COVINGTON:

Q. Did he tell you, Mr. McKenna, that he went there for the purpose of exhausting his remedies?

A. Yes.

148 Q. Did he tell you he thought he did not have to stay there because he was a minister of the gospel?

A. No, he did not tell me that.

Q. Did he tell you as to his status as a minister of the gospel?

A. He told me he was a minister of Jehovah Witnesses.

Q. Did he tell you he thought the draft board had illegally classified him?

A. Yes, he did.

Q. And that was the reason he would not stay at the camp, because he was a minister and had been illegally classified?

A. Yes, he did.

Mr. COVINGTON. That is all.

Mr. PHILIP. That is all.

Mr. PHILIP. Government rests.

Mr. COVINGTON. We will reserve the motion at this time until the close of the evidence.

The COURT. Do you care to make an opening statement?

Opening statement

Mr. COVINGTON. I merely desire to state to Your Honor that this defendant, as stated by the government's witnesses, registered under the Act; filed his questionnaire with Local Board A at Eldorado, and with that question-

naire he filed an abundance of proof, which was un-
149 disputed, to the effect that he was a minister of the gospel, a minister of religion, within the meaning of Sec. 53 of the Selective Service and Training Act; that he requested classification as a minister of religion exempting him from training service; that the local board illegally, arbitrarily and capriciously rejected his proof and refused to consider it and classified him as liable for training and service, contrary to the statute and contrary to the regulations, and without any evidence whatsoever that he was not a minister and exempt from all training as he claimed; and that by reason thereof the orders upon which this indictment is based are wholly void and illegal, and that the local board had no authority or jurisdiction to order him to report; the local board and Selective Service System violated his rights and privileges under the Act and regulations and deprived him of the right of due process to a full, complete and fair hearing, contrary to the Fifth Amendment to the United States Constitution, and, therefore, the defendant expects to prove that he is not guilty for the reason that he has no duty for training and service under the Act as charged in the indictment.

The COURT. As I gather it then, you rest your defense solely upon questions of law rather than fact?

Mr. COVINGTON. We rest them upon facts which
150 we expect to prove. The facts upon which we rest our defense have not yet been established in the evidence. We expect to offer the files of the draft board which are here, which corroborate these various statements that I have made and which will establish that this man has completely exhausted his administrative remedies and is now in position to obtain judicial review of the alleged illegality of the draft board's determination and finding. Because of that we rest the defense upon facts which shall be undisputed and which show and present to the Court in this case a pure question of law. But until we have established our evidence we will not be in position to urge these various legal conclusions that have been mentioned to Your Honor. Furthermore we feel, too, that there is an element in this case which the Court can and should consider, and that is, under the circum-

stances in the case in determining whether or not this man wilfully and knowingly violated the Selective Training and Service Act, in view of his good faith and honest belief that he was exempt from all training and service under the Act. That, of course, is covered by decisions rendered by the Supreme Court in the case of United States v. Murdock, reported in 298 U. S. which
151 shows a defense to an indictment based upon wilful intention to violate an act, that the good faith, honest intentions of the defendant may be considered by the Court in arriving at the guilt or innocence of the defendant.

The COURT. You may proceed and introduct your evidence.

(At this time a recess was taken until 1:30 P.M. this date, when the trial proceeded as follows:)

Mr. COVINGTON. May it please the Court, at this time the defendant will have identified the material parts of the cover sheet, draft board file, formed in and under the supervision of Local Board A, located at Eldorado, Arkansas. There has been introduced in evidence the questionnaire which is Government's Exhibit 1. Attached to and made a part of that questionnaire is Defendant's Exhibit G, which is a certificate of ordination.

(Defendant's Exhibit G marked for identification.)

Mr. COVINGTON. Together with Defendant's Exhibit H, which is an undated printed certificate purporting to be credentials of authority to the defendant, authorizing him to represent the Watch Tower Bible and Tract Society and Jehovah's Witnesses.

(Defendant's Exhibit H marked for identification.)

Mr. COVINGTON. Next for identification is Defendant's Exhibit I. This is the occupational questionnaire.
152 (Defendant's Exhibit I marked for identification.)

Mr. COVINGTON. Next for identification is Defendant's Exhibit J, which is a verified statement of Taze Hamrick Gibson to Local Board A.

(Defendant's Exhibit J marked for identification.)

Mr. COVINGTON. There has been referred to in the government's testimony what is known as Form 47, a special form for conscientious objectors, which the defendant asks that the Court have marked as Defendant's Exhibit K.

(Defendant's Exhibit K marked for identification.)

Mr. COVINGTON. Next is a statement dated November 11, 1942, signed by Gibson, addressed to Appeal Board No. 2, which is Defendant's Exhibit L.

(Defendant's Exhibit L marked for identification.)

Mr. COVINGTON. Next for identification is a letter addressed to National Headquarters from Gibson, dated November 18, 1942, being Defendant's Exhibit M.

(Defendant's Exhibit M marked for identification.)

Mr. COVINGTON. Next for identification is a letter dated November 20, 1942, signed by A. P. Reynolds, Chairman of the local board, addressed to the board of appeal.

(Defendant's Exhibit N marked for identification.)

Mr. COVINGTON. Next for identification is a letter dated November 20, 1942 addressed to Local Board A, signed by Troy Lewis, acting for the State Director of Arkansas.

153 (Defendant's Exhibit O marked for identification.)

Mr. COVINGTON. Next for identification is a letter from Troy Lewis, acting for the state director, addressed to Board of Appeal, dated December 2, 1942. Exhibit P.

(Defendant's Exhibit P marked for identification.)

Mr. COVINGTON. Next for identification is a letter dated February 16, 1943, addressed to Local Board A, signed by Troy Lewis, acting for the state director. Defendant's Exhibit Q.

(Defendant's Exhibit Q marked for identification.)

Mr. COVINGTON. Next for identification is a document entitled "Appeals Check List or Appeals Work Sheet", dated May 3, 1943, together with the attached papers, Defendant's Exhibit R.

(Defendant's Exhibit R marked for identification.)

Mr. COVINGTON. Next for identification is a letter from Troy W. Lewis to Local Board A, dated May 6, 1943, Defendant's Exhibit S.

(Defendant's Exhibit S marked for identification.)

Mr. COVINGTON. Next for identification is a letter dated May 14, 1943, addressed to Local Board A, received by Local Board A on May 20, 1943, signed by Taze Hamrick Gibson, to which is attached affidavits of Rising, Humphrey, Dixon and Britten, which were mailed to the local

board with a request that his case be reopened and considered entirely anew. Defendant's Exhibit T.

154 (Defendant's Exhibit T marked for identification.)

Mr. COVINGTON. Next for identification is a letter dated May 27, 1943, signed by E. L. Compore, State Director of Arkansas, addressed to Local Board A, Eldorado. Defendant's Exhibit U.

(Defendant's Exhibit U marked for identification.)

Mr. COVINGTON. Next is a letter addressed to National Headquarters, dated May 24, 1943, signed by Taze Hamrick Gibson, stamped received June 2, 1943. Defendant's Exhibit V.

(Defendant's Exhibit V marked for identification.)

Mr. COVINGTON. Next is a telegram dated May 26, addressed to National Headquarters, signed by Taze Hamrick Gibson, from Enid, Oklahoma, and stamped received June 2, 1943. Defendant's Exhibit W.

(Defendant's Exhibit W marked for identification.)

Mr. COVINGTON. Next for identification is a two page typewritten letter dated May 24, 1943, addressed to National Headquarters and signed by Taze Hamrick Gibson. Defendant's Exhibit X.

(Defendant's Exhibit X marked for identification.)

Mr. COVINGTON. Next is a letter dated June 4, 1943, from E. L. Compore, State Director, to Local Board A. Defendant's Exhibit Y.

(Defendant's Exhibit Y marked for identification.)

Mr. COVINGTON. Next is a letter dated July 1,

155 1943, signed by Patrick C. Harris, addressed to Local Board A, on Arkansas State Headquarters stationery, to which is attached letter dated June 25, 1943, on the stationery of the National Headquarters of the Selective Service System, addressed to State Director, and signed by Simon F. Denkle, Colonel, acting for National Director. Defendant's Exhibit Z.

(Defendant's Exhibit Z marked for identification.)

Mr. COVINGTON. Next is a letter dated July 2, 1943, addressed to State Director, signed by the Clerk of Union County Local Board A. Defendant's Exhibit A-1.

(Defendant's Exhibit A-1 marked for identification.)

Mr. COVINGTON. Next is letter dated August 17, 1943,

from Troy W. Lewis, acting for State Director of Arkansas, addressed to Local Board A. Defendant's Exhibit B–1.

(Defendant's Exhibit B–1 marked for identification.)

Mr. COVINGTON. Next is an order referring registrant to another local board for preliminary physical examination only dated September 10, 1943. Defendant's Exhibit C–1.

(Defendant's Exhibit C–1 marked for identification.)

Mr. COVINGTON. Next is report of examination dated September 22, 1943, the date appearing on the second page. Defendant's Exhibit D–1.

(Defendant's Exhibit D–1 marked for identification.)

Mr. COVINGTON. Next is a letter addressed to Taze Hamrick Gibson, signed by Troy W. Lewis, acting
156 for the State Director of Arkansas, dated October 22, 1943, which is Defendant's Exhibit E–1, and attached to that is a long hand letter from Taze Hamrick Gibson, addressed to the State Director of Arkansas.

(Defendant's Exhibit E–1 marked for identification.)

Mr. COVINGTON. Next is a letter dated June 5, 1944, addressed to the Local Board at Carlinsville, Illinois, signed by Lt. Col. Buck, Illinois State Headquarters, Selective Service System. Defendant's Exhibit F–1.

(Defendant's Exhibit F–1 marked for identification.)

Mr. COVINGTON. Next is a letter dated June 12, 1944, addressed to Local Board No. 1, Carlinsville, Illinois, signed by Clerk of Local Board A, Eldorado, Arkansas. Defendant's Exhibit G–1.

(Defendant's Exhibit G–1 marked for identification.)

Mr. COVINGTON. Next is conscientious objector's report dated June 15, 1944. Defendant's Exhibit H–1.

(Defendant's Exhibit H–1 marked for identification.)

Mr. COVINGTON. Next is order to report for work of national importance dated June 26, 1944. Defendant's Exhibit I–1.

(Defendant's Exhibit I–1 marked for identification.)

Mr. COVINGTON. Next is letter dated June 3, 1944, addressed to Taze Hamrick Gibson, signed by the Clerk of Carlinsville, Illinois, Selective Service Board No. 1. Defendant's Exhibit J–1.

157 (Defendant's Exhibit J–1 marked for identification.)

Mr. COVINGTON. Next is a letter dated July 3, 1944, addressed to Gibson from the Clerk of Local Board A, Eldorado, Arkansas. Defendant's Exhibit K–1.

(Defendant's Exhibit K–1 marked for identification.)

Mr. COVINGTON. Next is an order to report for pre-induction physical examination, dated July 3, 1944, which is Defendant's Exhibit L–1.

(Defendant's Exhibit L–1 marked for identification.)

Mr. COVINGTON. Next is an order to report for pre-induction physical examination dated July 22, 1944. Defendant's Exhibit M–1.

(Defendant's Exhibit M–1 marked for identification.)

Mr. COVINGTON. Next is a report of physical examination dated July 25, 1944, the date appearing on the last page. Defendant's Exhibit N–1.

(Defendant's Exhibit N–1 marked for identification.)

Mr. COVINGTON. Next is a certificate of physical fitness dated July 25, 1944. Defendant's Exhibit O–1.

(Defendant's Exhibit O–1 marked for identification.)

Mr. COVINGTON. Next is a letter dated July 28, 1944 addressed to Local Board A from the Clerk of the Board No. 1, Carrollton, Illinois. Defendant's Exhibit P–1.

(Defendant's Exhibit P–1 marked for identification.)

Mr. COVINGTON. Next is a letter dated July 28, 1944, from Troy W. Lewis, acting for State Director of
158 Arkansas to the National Director of Selective Service. Defendant's Exhibit Q–1.

(Defendant's Exhibit Q–1 marked for identification.)

Mr. COVINGTON. Next is a letter dated July 28, 1944, addressed to Local Board A, from the Clerk of the Carrollton, Illinois Local Board 1, being Defendant's Exhibit R–1.

(Defendant's Exhibit R–1 marked for identification.)

Mr. COVINGTON. The order to report for work of national importance is omitted because it is Government's Exhibit 3.

The next and last is a letter dated November 27, 1944 on the stationery of the Arkansas State Headquarters, addressed to Local Board A, signed by Higgins, acting for State Director. Defendant's Exhibit S–1.

(Defendant's Exhibit S–1 marked for identification.)

Mr. COVINGTON. In connection with these various ex-

hibits that have just been identified it may be stated for the purpose of the record that these exhibits, together with Government's Exhibits 1 to 3, constitute all of the material parts of the selective service questionnaire relating to the history and background of this man's case while before Local Board A at Eldorado, Arkansas, together with the induction process that was thereafter pursued pursuant to the Act and regulations. At this time the defendant offers in evidence all of the exhibits,
Defendant's Exhibits G to Defendant's Exhibit
159 S-1, inclusive. And in connection with this offer the defendant says that the undisputed evidence shows that the Watch Tower Bible and Tract Society, and Jehovah's Witnesses, are a recognized religious organization, and that there is no evidence in the file disputing these facts; that the undisputed evidence shows from these exhibits that the defendant was trained for the ministry in that organization; was duly recognized as a regular minister and later as an ordained minister, long before he registered under the draft law, and that he was at all times acting as a duly ordained, full-time missionary evangelist with the Watch Tower Bible and Tract Society, and there is no evidence in the file disputing this fact; that these documents show that the defendant was recognized by the Watch Tower Bible and Tract Society and Jehovah's Witnesses at all times as an ordained minister and missionary evangelist and there was no evidence in the file to dispute such fact; these documents show that the defendant regularly performed his duties and devoted his full time to the furtherance of the activities of the Watch Tower Bible and Tract Society and Jehovah's Witnesses as such minister, and there was no evidence in the file disputing that fact; the documents show that the defendant had dedicated his entire life to the furtherance of the functions of Jehova's Witnesses and the activity of the Watch Tower Bible and Tract Society as a minister of the gospel and there is no evidence in the file to dispute this fact.

160 These documents show that he stood in relation to Jehovah's Witnesses and the Watch Tower Bible and Tract Society in the same way and in the same degree as to the orthodox clergy and other religious organiza-

tions, and there is no evidence in the file disputing that fact. The documents further show that there is no evidence in the file that this defendant fictitiously claimed the classification of 4D as a minister, or that he impersonated a minister of the gospel or minister of religion. Moreover these documents show that there is no evidence establishing that he was not actually ordained and authorized by the Watch Tower Bible and Tract Society and by Jehovah's Witnesses and that he was not a minister within the meaning of Section 5-d of the Act. These documents further show that there is no evidence that the defendant does not come within the definition of a minister of religion, as appears in Opinion No. 14, of the National Headquarters of the Selective Service Opinions relating to ministerial status of Jehovah's Witnesses, and the undisputed evidence shows that he is a minister of religion within the meaning of that Opinion No. 14. Next, that these documents show that the only reason he was not given this exempt status under the Act and regulations was because his name did not appear on the certified list filed with the State Director of Arkansas, and thus the board and the appeal board arbitrarily re-
161 fused and failed to exercise their duty and review his motions filed on the evidence under the Act to consider his claim for exemption. Therefore, these various documents show that there is no evidence that he was not a minister as claimed: Furthermore that the evidence shows that the board acted dishonestly and contrary to the facts, and the agency acted contrary to the law and the selective service opinions, and contrary to undisputed evidence in excess of their statutory authority, without jurisdiction, without support of any evidence showing the defendant was not a minister, contrary to the evidence and contrarily to the Act and regulations. They acted arbitrarily and capriciously and in violation of defendant's rights under the Act and regulations, and in violation of the due process clause of the Fifth Amendment. And in addition to that, that the board violated the defendant's procedural rights in failing to reopen his classification and reconsider his case anew as requested, which was arbitrarily and contrary to the Act as well as the

Selective Service Opinions and the regulations promulgated under the Act.

This offer is made in connection with our defense to the indictment that the order upon which the indictment is based is void, illegal, contrary to the Act, contrary to the regulations and the Constitution of the United States, and inasmuch as this is a trial to the Court I submit that not only is this evidence material, but that no harm
162 will be done to the government by receiving it. This is my offer of proof of the entire file.

Mr. PHILIP. To that offer of proof the government objects for the reason it is wholly irrelevant to any of the issues. It is wholly immaterial and is not competent to establish any defense to the charge. Further, the proof sought is in direct violation of the rules of evidence laid down by the Courts holding that the matter of classification is wholly within the province of the Selective Service only and that proof of erroneous classification by the Selective Service Local Board is not a defense to a criminal charge for violation of the Selective Training and Service Act, and regulations adopted thereunder. Further, that this charge is one of deserting a work camp and not violating any order of the Arkansas board.

Mr. COVINGTON. Your Honor, in answer to that objection, if the government's position is sustained and the position Mr. Philip has taken is correct, then I urge that the construction Mr. Philip places upon the Act and regulations so as to require a defendant who is exempt under the Act to remain in camp or do work of national importance as a condition precedent to obtaining judicial review ——

Mr. PHILIP. Just a minute. I am going to interrupt. I never said anything of the sort and you know it.

Mr. COVINGTON. As a reason for denying him a
163 right to challenge the classification in defense to the indictment. If that construction that he has placed upon the Acts and regulations, and if accepted by the courts, would convert the Act and regulations into a bill of attainder contrary to Sec. 3, and Sec. 9, Article I of the Constitution; that he has transferred and surrendered the judicial power of United States Courts to the draft board, contrary to Article III of the federal Constitution. It would

deny the defendant the right to prove he has no duty to render either training or service under the Act, and to make his defense to the indictment contrary to the due process clause of the Fifth Amendment of the federal Constitution. If this construction was accepted it would deny and abridge the right of the defendant to have a trial by the Court as to all of the issues involved in the case, contrary to the Sixth Amendment. Furthermore, it would permit the conviction of the defendant without evidence as to his duty and responsibility under the Act, and, in effect, would deny him the right of counsel contrary to the Fifth and Sixth Amendments to the federal Constitution. That, therefore, it would permit a local board to make a classification, and would permit the defendant to be found guilty of violating a duty and thus convert the Act and regulations into an ex post facto law, contrary to the Clause 3, Sec. 9, Article I, of the Federal Constitution.

That is our offer and our view as to the law
164 relative to the objection made to this offer of testimony.

Mr. PHILIP. We move the speeches of counsel be stricken from the record and that the offer be allowed to stand and that it be denied by the Court.

Mr. COVINGTON. I would like to say this. That was not a speech. I was merely trying to close the record on the grounds I am urging here in answer to the construction placed upon the Act. The record is made now and that is my sole purpose. I make myself plain to the Court and I am not here to make a speech, but I am here to make a record and protect this man's rights.

The COURT. I think the remarks of counsel, under the circumstances, were proper and right and may remain in the record. In other words, I want every man who represents a defendant in this court to have any record he wants that is consistent with the facts. Because you have an opinion and no matter how firmly I am convinced what the law is, every once in a while I have found out I am wrong. I never want to deny a man the right to review any findings of mine upon any proposition he thinks material to the case. These exhibits that are offered in evidence, as I understand from the remarks of counsel,

pertain solely to the matter of the classification of the defendant in this case by the Selective Service board. I don't think this Court has anything to do with that. I don't think that it in any way affects any of the issues in
165 this case, and because I am firmly convinced as to that proposition I am going to sustain the objection to the introduction of the evidence.

Mr. COVINGTON. I respectfully except to the ruling for each of the reasons stated.

The COURT. Exception allowed.

166 ALICE SIMPSON, being called as a witness by the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. COVINGTON:

Q. Your name is Alice Simpson?

A. That is right.

Q. Where are you living at present?

A. Higginsville, Missouri.

Q. Before that did you live in Eldorado, Arkansas?

A. I did.

Q. Were you living in Eldorado, Arkansas, during the years 1940 to 1942?

A. That is right.

Q. During the time that you lived in Eldorado, Arkansas, did you have occasion to become acquainted with the defendant, Taze Hamrick Gibson, in this case?

A. Yes, I did.

Q. Just under what circumstances and conditions did you get acquainted with Mr. Gibson?

A. In 1941, October or November, about the 16th day, he came to Eldorado to carry on his ministerial work there.

Q. Do you know whether or not he was assigned to a regular congregation?

Mr. PHILIP. Objected to as wholly incompetent, irrelevant, and immaterial.

The COURT. Sustained.

MR. COVINGTON. In view of the ruling that has
167 been made by the Court on the exhibits, and in view of the ruling that has been made on this

particular question, there is quite a number of questions that I desire to propound that would elicit information and evidence as to his activity as a minister in charge of that congregation, located at Eldorado, and in this connection and in view of the Court's ruling, I would like the privilege of stating what this witness would testify to if permitted to do so.

The COURT. You may make your offer of proof.

Mr. COVINGTON. This witness would testify, if permitted to do so, that in the fall of 1941, the defendant, Taze Hamrick Gibson, was assigned by Watch Tower Bible and Tract Society and Jehovah's Witnesses, to preside over and build up a congregation of Jehovah's Witnesses in Eldorado, by carrying on his ministerial work, presiding over the congregation and performing regular ceremonies that are ordinarily performed by ministers of Jehovah's Witnesses in charge of a congregation, and that the congregation of Jehovah's Witnesses looked upon this defendant as standing in the same relation to Jehovah's Witnesses and the Watch Tower Bible and Tract Society as do the orthodox clergy of the recognized, orthodox denominations. That in addition to his regular performance of these congregational duties, which required him to deliver sermons regularly two times
168 each week, and also engage in full time missionary evangelistic work, which required making calls from house to house, door to door, and build up and conduct Bible studies without charge in people's homes, and also to call back on people who were interested in the work he was doing, and that he carried on this work from the time he came there until and including the month of October, 1942, when he left Eldorado, and has since, according to information, been carrying on missionary work elsewhere. That during the time that he was in Eldorado his whole time and his full time was devoted exclusively to the performance of these ministerial duties and missionary evangelistic work. And also that he was recognized by the Watch Tower Bible and Tract Society and recognized by that congregation as a regular ordained minister of the gospel, and that they all looked upon him as their minister. And this evidence would be offered in connection with our contention that judicial review would be available in

defense to the indictment, and not only if it is available would be confined to a review of the file itself, which has been offered, but also, Your Honor, can and should consider this evidence de novo upon the question of the authority and jurisdiction of this board to order a man that Congress said should be exempt from training and service. That is the offer and purpose of the proof thus proposed.

Mr. PHILIP. Same objection as made to the former offer.

169 The COURT. Same ruling.

Mr. COVINGTON. We except for the reasons already set forth in the other exception. It is understood that our exceptions are taken on the same grounds this time as were taken to the former exception as to the denial and rejection of those documents?

The COURT. That is as I understand it.

Mr. COVINGTON. That is all.

Mr. PHILIP. That is all.

170 TAZE HAMRICK GIBSON, being called as a witness in his own behalf, and being duly sworn, testified as follows:

Direct examination by Mr. COVINGTON:

Q. Would you please state your full name, your age, and where you were born?

A. Taze Hamrick Gibson. Age 22. Born in Meridian, Mississippi.

Q. What is your father's name?

A. John Dodds Gibson.

Q. Your mother's name?

A. Maiden name?

Q. Yes?

A. Mattie Hamrick.

Q. Where does your father and mother live?

A. Collinsville, Mississippi.

Q. What town is that near?

A. About 14 miles northwest of Meridian.

Q. Where were you raised up, Mr. Gibson?

A. Collinsville. From the time I was about six years old.

Q. Did you ever live in Meridian?
A. Yes.
Q. When?
A. I was born in Meridian and lived there until about 1927 or 1928.

171 Q. After 1927 or 1928, you and your family moved then to Collinsville?
A. Yes.
Q. How long did you stay at Collinsville?
A. Until I left home to go into minister work.
Q. What year?
A. June 1940.
Q. What schooling did you have? Where did you attend school?
A. I attended the Watch Tower Bible and Tract Society bible classes held in Meridian, Mississippi.
Q. What public schools did you attend?
A. Collinsville Consolidated high school.
Q. How long did you attend that school?
A. Until the fall of 1939.
Q. Did you also attend grade schools before you entered high school at Collinsville?
A. Yes.
Q. Was that part of the Collinsville consolidated school?
A. Yes.
Q. When did you first enter the Collinsville consolidated school? What year, if you recall?
A. I believe 1928 or 1929.
Q. When did you discontinue high school at Collinsville?
A. In the fall of 1939.

172 Q. What other training have you had; education have you had in addition to that received at the Collinsville Consolidated School?
A. In addition to that I have received both instruction and training at Watch Tower Bible and Tract Society bible classes held twice a week in Meridian, Mississippi.
Q. Were those classes conducted by the congregation as a school in preparation for those desiring to become ministers?
A. Yes. Those attending were getting instructions so as to employ themselves to be ministers of the gospel.
Q. You are one of Jehovah's Witnesses?

A. Yes.

Q. Were your father and mother Jehovah's Witnesses?

A. Yes.

Mr. PHILIP. I think this is immaterial.

The COURT. This is the defendant in this case and within reasonable limitations I think he should be permitted to show what he has done and what kind of a man he is. Overruled.

Q. Now, Mr. Gibson, did your father as one of Jehovah's Witnesses bring you up as one of Jehovah's Witnesses and give you training in the bible at home?

A. Yes, yes, he did.

Q. Was he a minister of the gospel?

173 A. Yes.

Q. When did your father begin to give you training in preparation for the ministry?

A. Ever since I can remember. I found out from the bible concerning God's provision for obedient persons all my life.

Q. When did your father begin to give you regular instructions in preparation for the ministry, at home?

A. About 1935 I began to receive regular instruction. That is, I convinced myself that I wanted to enter the ministry work and make it my life work. Before then I had attended also the bible classes in Meridian.

Q. After you made up your mind to become a minister in 1935 did your father give you instruction at home as well as what you received at the bible class?

A. Yes, he did.

Q. How long did you receive that instruction regularly from your father, as minister, and at the Watch Tower Bible and Tract Society school?

A. Until I left the vicinity in 1940.

Q. Before you left the vicinity in 1940 did you become a regular minister, were you ordained?

A. Yes, I was ordained, at solemn, serious ceremony in Birmingham, Alabama.

Q. Under whose auspices?

Mr. PHILIP. Objected to as wholly immaterial.

174 The COURT. We will let the witness answer.

A. In 1938, in Birmingham, I was ordained by water immersion and the ceremony was carried out and

conducted by a representative or minister from the Watch Tower Bible and Tract Society, and he delivered a sermon on baptism, what baptism meant and what ordination meant, and pointed out when being baptized it symbolized consecration to Jehovah God, to do His will and that His will should be preached to all nations. After this sermon, which lasted about thirty minutes, then prayer was offered and those who were to be ordained or immersed went to the immersion pool where this minister of the gospel from the Watch Tower Bible and Tract Society performed the immersion. Then I, among others, immediately began to carry out our agreement by engaging in the minister work from then on. I went out from house to house in the city of Birmingham and began to preach the gospel to all of those who would listen.

Q. Since your ordination have you been regularly preaching the gospel that you have mentioned?

A. Yes, I have.

Q. The work that you did then, where did you carry that on? After ordination. What place?

A. After my ordination I carried on in Collinsville, Mississippi until 1940. In that vicinity.

Q. After 1940 where did you go?

A. I entered full time ministry work and went to
175 Hattiesburg, Mississippi.

Q. What sort of work did you do there?

A. I performed missionary and evangelistic work, establishing congregations, by conducting bible studies in the people's homes and by going from door to door as Christ and the apostles did, as shown in our bible, Acts 20:20, and Mark 6, and other places, and I followed the example set by those Christians, and in that way systematically preached the gospel in the city of Hattiesburg.

Q. What other method did you employ in that regard in Hattiesburg?

A. I also employed the public method. I had congregations, bible study groups, and also we did our work on the streets of Hattiesburg.

Q. How long did you carry on your missionary and evangelistic work and ministerial work in Hattiesburg?

A. Until the fall of 1940.

Q. Then where did you go?

A. To Macon, Mississippi.

Q. At Macon, Mississippi did you carry on your missionary and evangelistic work there in the same way you did at Hattiesburg?

A. Yes.

Q. And for how long?

A. Until the late summer of 1941.

Q. And after late summer of 1941, where did you go?

176 A. To Eldorado, Arkansas.

Q. What did you do in Eldorado, Arkansas?

A. There I presided over the local congregation of Jehovah Witnesses, and also presided in the ministry work there; full time ministerial work. That was my sole occupation in the city of Eldorado, and also in Union County in which Eldorado is located. I carried on my minister work there by going from house to house and also we had public meetings.

Q. Did you also regularly preach to the local congregation there?

A. Yes. At least twice each week.

Q. How many hours each week or each month would you actually devote to preaching and to preparation?

A. Around 150 to 200 hours a month in the ministerial work.

Q. Did the congregation of Jehovah's Witnesses look upon you as standing in relation to them as do the orthodox clergy to their congregations?

A. Yes. I was presiding.

Mr. PHILIP. I object to that as calling for the conclusion of the witness, for a statement of fact.

The COURT. It calls for his conclusion. The answer may go out.

Mr. COVINGTON. I will withdraw that.

177 Q. Did the Watch Tower Bible and Tract Society and Jehovah's Witnesses regularly appoint you to represent them as their minister in Eldorado?

A. Yes; I was appointed by Watch Tower Bible and Tract Society to be presiding minister there.

Q. Was your ordination recognized by Watch Tower Bible and Tract Society?

A. Yes, it was.

Q. Were you sincere in your work you were doing in Eldorado?

A. Yes; I surely was.

Mr. PHILIP. Objected to as wholly self serving.

The COURT. Let the answer stand.

Q. While you were at Eldorado did you register under the Selective Training and Service Act of 1940?

A. Yes, I did.

Q. And with what board?

A. Local Board A, Union County.

Q. At that time were you carrying on your missionary and evangelistic work?

A. Yes.

Q. Presiding over a congregation?

A. Yes.

Q. Did you file your questionnaire with the local board, which is Government's Exhibit 1?

A. Yes. I filed it and furnished proof that min-
178 ister work was my occupation and I should be given 4D classification.

Q. After you filed your questionnaire with the local board how long did you continue in your ministerial work in Eldorado?

A. Until September or October, I believe.

Q. Of what year?

A. The same year, 1942.

Q. That is the same year you registered?

A. Yes.

Q. Just a year after you came to majority?

A. Yes.

Q. Then where did you go?

A. My next assignment by the Watch Tower Bible and Tract Society was Muskogee, Oklahoma, and after that I lived a short time in McAlester.

Q. How long were you in Muskogee?

A. Two and one half months.

Q. What did you do there?

A. I continued in my full time minister work in Muskogee.

Q. You continued to preach the gospel in the same manner?

A. Yes.

Q. Did you do the same sort of work in Muskogee that you did in Eldorado?

A. Yes.

179 Q. When you left Muskogee, where did you go to?

A. Enid, Oklahoma.

Q. How long were you at Enid?

A. Until July 1943.

Q. What did you do in Enid?

A. I continued in my preaching work there at Enid. In the same manner as other towns.

Q. And you carried on that work in the same way that you did in Eldorado?

A. Yes.

Q. Did you perform the same sort of duties?

A. Yes.

Q. Upon leaving Enid where did you go?

A. I went to Verdun, Illinois.

Q. Why did you go to Verdun?

A. On assignment there by the Watch Tower Bible and Tract Society.

Q. How long did you remain at Verdun, Illinois?

A. Until the last of October 1943.

Q. And then where did you go?

A. To Geneseo, Illinois.

Q. What did you do there?

A. I was sent there to establish a local congregation of Jehovah Witnesses and also to daily preach the gospel and to perform missionary and evangelistic work in the homes of the people and also publicly.

180 Q. Did you carry on your dealings there in the same way you did in Eldorado?

A. Yes, in the same manner.

Q. After staying at Geneseo when and where did you go to?

A. Along about April, the last of April, I went to Whitehall, Illinois.

Q. How long did you stay there?

A. Until about the last of October or first of November.

Q. Then where did you go?

A. Clinton, Indiana.

Q. What did you do at Clinton, Indiana?

A. I was also sent there by Watch Tower Bible and

Tract Society to perform missionary and evangelistic work and to generally preach the gospel from house to house and publicly.

Q. Where are you assigned now to do this work?

A. Clinton, Indiana.

Q. How many hours did you devote each month to the performance of your missionary and evangelistic work in Clinton, Indiana, and these other places you have mentioned?

A. About 175 hours a month or over.

Q. In the performance of all of these duties did you do it under the direction of the Watch Tower Bible and Tract Society or Jehovah's Witnesses?

A. Yes.

Q. Are you now in good standing with Watch Tower Bible and Tract Society as one of its ordained ministers?

181 A. Yes, I am special representative of the Watch Tower Bible and Tract Society, working in Clinton.

Q. What is your purpose in preaching the gospel in the manner that you have indicated? What is the purpose of building up congregations? You mentioned the building of congregations.

Mr. PHILIP. That is objected to as immaterial.

The COURT. Sustained. I don't think we will take the time to go into that. I have been liberal with you in allowing you to give the background of this man, but I think that is as far as you ought to go.

Mr. COVINGTON. I should like to except to the Court's ruling at this time and would like to make an offer of proof in connection with his testimony, which is offered not for the purpose of showing his background, for I agree with you you have been quite liberal in allowing me to develop his background, but now I say, in connection with what I have said since the trial began, we are entitled to offer this proof on the question of review of the want of authority on the part of the local board, and I would like to make this offer of proof. I desire to establish by this witness that as a part of his duties and

182 in addition to his missionary and evangelistic work, which is 175 hours a month, at Eldorado and at other places he performed congregational duties. That is to

say, that at least once or twice each week, before congregations located in these various cities where he was assigned, he delivered sermons and bible discourses upon the bible and prophecies to the congregation at least once each week; and that in performance of his congregational duties he presided over all of the meetings of the congregation and acted as a presiding minister; he looked over the affairs of the congregation and taught them and others in ways and means of properly carrying out their covenant obligations as followers of Christ Jesus, and that he stood in relation to the congregation in the same way as do ministers of the orthodox denominations. In addition to that I propose to show by this witness that the 175 hours each month that was devoted to evangelistic and missionary work required him to call from house to house and place to place in the primitive way as did Christ Jesus and the apostles who stated they went from house to house and place to place for the purpose of preaching. Furthermore he did this house to house
183 preaching as a practical way of reaching the people in their homes, as it is a known fact that very few people can be persuaded to come to a congregation and he considers it an obligation to take this message to people into their homes and leaving bible tracts with them, which he does for no selfish purpose but for charitable and benevolent purposes. That in addition to that he taught publicly upon the streets by means of the distribution of bible literature, which is a symbolic way of preaching and which is the way that Christ Jesus and the apostles did, and is practical for the reason he did it in order to reach people that he was unable to contact while calling from house to house. In addition to that he made a practice of calling back upon the people he met and who showed an interest in his work and there discussed with them and answered bible questions and explained reasons as to the way they should study, and if a person was interested sufficiently he would establish in a home bible study and there conduct one hour bible study course each week in the people's home without any obligation at all; and that the reason he did this was for the purpose of showing the people that the Kingdom or government of Al-
184 mighty God, which is a righteous government, to which Christ Jesus taught him to pray, was their

only hope of escape from the battle of armegeddon, spoken of in Revelations; and that he was required to preach this gospel as one of the followers of Christ Jesus as a witness unto all nations because he witnessed to all mankind that with Almighty God and Christ Jesus they are being led from this battle of Armegeddon, which is a place of everlasting destruction from which proceed the awful demon, and that he sees no circumstantial evidence that this kingdom is near at hand, and the circumstances mentioned by Christ Jesus in Matthew 24th Chapter, Mark 13th Chapter and Luke 21st Chapter, show positively that the work he has to do is of national importance in order that the people can see their way to again live everlastingly in the kingdom of Almighty God, which will bring peace and prosperity and happiness to the people; and that he taught this gospel and this message to the people without any profit; that he received a small allowance of $25.00 a month from the society; that he gets help from his folks at home and in that way he sustains himself, and that he has done this seriously and
185 honestly and for the sole purpose of magnifying the name of God, and for the purpose of doing good unto other persons; that he has not engaged in it for selfish purposes; and he has not engaged in any secular work of any kind or character since he has been in Eldorado, Arkansas. And that he showed all of these things to his board. That is my offer, Your Honor, and I would like to say that it is offered on the question of authority and that the Court has the right to review the classification as a defense to the indictment, and that the Court should take this evidence de novo to ascertain the lack of authority of the board to order this man to do work of national importance.

Mr. PHILIP. Same objection as to the other offers.

Mr. COVINGTON. May I add this: I may state that we say that the government's construction placed upon the Act which would deny the Court the right to receive this evidence in defense to the indictment, would abridge the rights of the defendant for each and every one of the reasons that I stated in answer to the objection made by the government to the offer of the various documentary exhibits, G to S-1, inclusive.

Mr. PHILIP. Same objection.

The COURT. Sustained.

186 Mr. COVINGTON. Exception.

The COURT. Exception allowed.

Q. Now, Mr. Gibson, you registered in 1942. Is that correct?

A. That is correct.

Q. That was at the time you were required by law to register. Is that true?

A. That is true.

Q. And you filed the various documents that bear your signature among the list of exhibits, G to S-1, inclusive, did you not, with the local board?

A. Yes.

Q. Now, after you registered and after you sent your questionnaire, you filed what is known as Form 47, did you not?

A. Yes; I believe I did.

Q. After the board refused to reopen your case in May 1943, and after you wrote to the national and state director, did you receive any orders of any kind to take any further action under the selective service regulations?

A. Yes; I received an order to report for physical examination.

Q. Where was that, and when?

A. The order was from the local board at Eldorado, Arkansas, but at that time I was living in Illinois. I received my examination in Chicago on September

187 22, I believe, 1943.

Q. Did you take the physical?

A. Yes, I did.

Q. And you were accepted, were you not?

A. Yes.

Q. Did you take another physical later on?

A. Yes.

Q. You were accepted again?

A. Yes.

Q. And after you had taken the other physical and were accepted a second time, did you thereafter receive an order to report for work of national importance, which is identified as Government's Exhibit 3?

A. Yes, I did.

Q. That required you to report at the camp at Hill City, Pennington County, South Dakota, and you were ordered to report at the local board on the 21st day of August 1944, at Carlinsville, Illinois, and receive your transportation to go to the camp, did you not?

A. That is right.

Q. Tell us what you did after receiving that order?

A. I reported to the draft board at Carlinsville on the 21st day of August. I was given meal request forms and transportation to Hill City. I arrived in Hill City about noon on August 23rd. Then I called up the camp, which phone number had been sent me and about two
188 o'clock the camp truck came in. I got out to camp about 5:30 or 5:45. I went into the office of the CPS Camp No. 57, and asked to see the camp director. I was informed he was out of town, out of camp, and would probably be out for a few more days yet.

Q. Who did you talk to?

A. To the director in charge, Mr. Oscar Wiebe. I then told him I understand one entering camp is required to be given a physical examination to be found acceptable. I told him I would like to have that physical examination as soon as possible. Mr. Wiebe told me the truck did not go into Hill City where the doctor's office was. The next day, which was Friday, the doctor would not be in his office so it would be Saturday before I could get my examination. Then I was shown my bunk where I would sleep. When Saturday came around Mr. Wiebe called me in his office and told me I could not get my examination that day because the doctor was not in his office again. I told Mr. Wiebe I would like to have it as soon as possible. On Monday I was sent in to Hill City and received my examination.

Q. What date?

A. That was on August 28th. I passed my examination and Mr. Tschetter, Camp Director, came back in the same car.

Q. That is, he arrived from where?

A. From Colorado, I believe, some place.

Q. And the car picked him up at the railroad station?

189 A. That is right.

Q. And took you and Mr. Tschetter and the driver off to the camp. Is that correct?

A. That is right.

Q. What happened upon your arrival at the camp, if you recall?

A. We arrived at the camp around one o'clock. I gave Mr. Tschetter about forty-five minutes. He sat in his office and I went into his office and told him he probably knew I had arrived in camp the Wednesday before, the 23rd, but due to the fact he had not been in I hadn't had opportunity to talk to him. So I told him I had a two-page, typewritten statement of facts concerning my minister work——

Q. Now, you are talking about Defendant's Exhibit F, are you not? That is the letter you gave Mr. Tschetter?

A. That is right.

Q. What did you do with that letter?

A. I handed it to Mr. Tschetter and told him I would like for him to read it and then I would like to have a talk with him. Mr. Tschetter took the letter and began to look it over, and on the second page of the letter, he made the remark when he was reading the second page and looking it over, he says, I see you say here you can't conscientiously remain in camp. It would be a violation of your conscience and that to you, doing work in camp, is helping the war. He says, I disagree with you. I think
190 you can at least remain in camp and do this work. He says, I don't see anything about it that would violate your conscience. I explained to Mr. Tschetter I had my covenant with the Almighty God Jehovah to do His Will, and I had solemnized it by water baptism. I called his attention to what God's will was and called his attention to the scripture and this gospel was to be preached to all nations. That I was commissioned to preach good tidings, proclaim liberty——

Mr. PHILIP. That is objected to as not responsive.

The COURT. I think it is responsive, but I don't think it is material. I don't like to burden the record or take up too much time with stuff that is not material.

Mr. COVINGTON. Mr. Tschetter has testified to a conversation which lasted approximately an hour or an hour and a half. We are not going through all of the details,

but I would like to have this man, since he is charged now with wilfully leaving the camp, with unlawfully leaving, I believe his entire conversation with this man should be, at least the material parts of it, related to his state of mind, should be considered by the Court to determine whether or not this man had the necessary criminal intent that he is charged with in this indictment. I believe since the witness Tschetter has testified to the
191 matter this man should be permitted to answer the testimony of Mr. Tschetter.

The COURT. He can do that without delivering a dissertation on the tenets of the particular creed he professes.

Mr. COVINGTON. He was asked why this would violate his conscience. This is a conscientious objectors camp. It is true the conversation did actually take place. Mr. Tschetter testified to the conversation and I believe that the defendant, as a part of the defense should be permitted to give it.

The COURT. He has already told the reason he objected. The reason it bothered his conscience, his covenants with Jehovah God to do certain thing, and in the camp he could not keep his covenants, to give his state of mind. I don't want to be arbitrary but I don't want to burden the record with a lot of evidence I don't think is material at all.

Mr. COVINGTON. I don't like to take the position of arbitrarily disagreeing with the Court, but Mr. Gibson has retained me to represent him, and he has asked me to do it, and I feel if he wants to he should be permitted to give his evidence. I am not doing it for the purpose of burdening the record. I am doing it for the purpose
192 of having him come clean with all of the facts.

The COURT. He has come clean with the facts that have any bearing on the issues in this case. He has already gone over all of them. In addition to that he has testified to enough to be sufficient to convince anybody as to his state of mind and conscience in connection with the order to go out there and perform that work. I think he has gone far enough. The objection is sustained.

Mr. COVINGTON. We would respectfully except to the ruling.

The COURT. Exception allowed.

Mr. COVINGTON. I would like to make an offer of proof.

Mr. PHILIP. I think it is a mistake for me to object and let counsel make a speech.

Mr. COVINGTON. I believe he misinterprets my purpose and I cannot agree with his statement about my making speeches.

Mr. PHILIP. The record shows it.

Mr. COVINGTON. Regardless of your opinion, Mr. Philip, I say here I am not here to make speeches. I am here to get the proof in. In order to have the matter reviewed I have to offer the proof.

Mr. PHILIP. I still say I ought to keep quiet.

193 The COURT. It is his right.

Mr. COVINGTON. In connection with his further conversation with Mr. Tschetter as to the reasons why his conscience would be violated by staying at this camp we would show that the defendant told him that he had been acting as a minister of the gospel since 1940, full time, and that he felt that if he was required to stay at this camp he would be taken entirely away from the performing of his missionary and evangelistic duties which required him to devote in territory assigned to him in Illinois, which was not out there where the camp was located, more than 175 hours a month; and that since Congress had exempted ministers and since he was a minister the draft board had violated the law and that he had not violated the law, and he honestly and sincerely believed he had no duty to stay at the camp, and for that reason his conscience was not only impugned by an order to stay there but his rights were violated by the order that he stay there.

The COURT. Is that your offer?

Mr. COVINGTON. That is all of the offer on that one phase. There is some other points and questions that may come up.

194 Mr. PHILIP. I make the same objection.

The COURT. Objection sustained.

Mr. COVINGTON. We except to the ruling.

The COURT. Exception allowed.

Q. Now, what other points, Mr. Gibson, or what other questions were discussed between you and Mr. Tschetter before you left?

A. Mr. Tschetter mentioned the fact, he wondered why I was classified in 4E, and why I was not satisfied with it if I was given 4E in the first place. I explained I had never even asked for 4E at any time, and the undisputed evidence in my file showed I should be given 4D as a minister. I had obeyed every order of the draft board, even obeying their unlawful order to report to the camp at Hill City. I told him they had violated the law Congress had made by illegally requiring me to report to CPS camp in South Dakota.

Q. What other questions?

A. Mr. Tschetter seemed to give me some advice. He said no doubt I would be arrested and led into court, and sent to prison and when I got out I would be branded as a criminal. I would always be branded as an ex-convict.

Q. What did you say?

A. I said to him even if I was that would not be the first time it ever happened, that my leader, Christ Jesus himself was unlawfully arrested and unlawfully
195 tried and convicted, and those who were with Him, His apostles, were sentenced. I called his attention to Peter and John who were imprisoned and would have been released had they been willing to stop their preaching work. Acts 4:19. I told him I would follow the admonitions those faithful Christians set forth. Then he also mentioned I would be tried in Deadwood, South Dakota, and that Judge Wyman was the presiding judge there and that I would not have a chance at all. That Judge Wyman hated Jehovah Witnesses like a snake. That he would give me the limit. Which I explained I knew nothing about Judge Wyman at all. That is about the first I had ever heard of him. I explained as far as I knew he was an honest and sincere man and would be willing to render a fair decision. I said that remains to be seen but if he is not I will obey God no matter what sentence man passed upon me. I will follow the example of the three Hebrew children when ordered to bow down and worship the golden images. When they would not do it they were ordered to be thrown into a burning fiery furnace, and they said, and I say as they did, if God sees fit to deliver them He will do so, but if He doesn't see fit I will obey God, just as the three Hebrew children did.

Q. Then what?

A. That was about the conclusion of our discussion as well as I can remember. There is many things I can't remember. I asked Mr. Tschetter then, in fact I
196 told him, that I had reported to camp only to exhaust the administrative process for getting my correct classification, and that the Supreme Court ruling the Falbro and Billings cases caused me to obey the order of the draft board to report to the camp in order to exhaust every possible means to get a correct classification. I told him that was my purpose of reporting there. Then I asked that he give me a statement showing I had reported in camp on the 23rd day of August; that after completing the process of induction without agreeing to do any work in the camp, committing myself to the camp to do work there and in order to complete the process of induction I took my examination. So I asked that he give me a letter of recognition that I did this and he signed it.

Q. Do you refer to Defendant's Exhibit E? This statement signed by Mr. Tschetter, which is in evidence? That you exhausted your remedies by coming out there and taking the physical examination?

A. That is right.

Q. Anything else?

A. That was about the end of our conversation, I believe.

Q. Did you go out there for the purpose of violating the law?

A. No; I didn't go out there for that purpose at all. I knew I could not have been lawfully ordered to
197 go out there. I had been illegally ordered to go out there. The draft board was the law violators and not me. I obeyed all of the law and the law states ministers of the gospel are not obligated to go to camp and do work of national importance, and he has been granted the right under the selective service act rules and regulations to file proof showing he is a minister of the gospel and that he is exempt from military training and that he might keep on with his work of comforting those who are mourning because of wicked conditions existing on the earth.

Mr. Covington. That is all.

Cross-examination by Mr. PHILIP:

Q. As I understand it, Mr. Gibson, briefly stated, your life history began at Meridian, Mississippi, on September 14, 1922?

A. That is right.

Q. You have always lived in the United States?

A. Yes.

Q. A Citizen of the United States?

A. Yes.

Q. And you registered in 1942 with Local Board No. A, in Eldorado?

A. Yes.

Q. Your first classification was 1A?

A. Yes.

Q. Then you filed an application as a conscien-
198 tious objector?

A. I filed an application to further state my claim as a minister, not as a conscientious objector.

Q. Didn't you file a conscientious objector application?

A. I filed Form 47.

Q. And the board changed your classification from 1A to 4E. Your classification was changed by the selective service system from 1A to 4E?

A. Yes.

Q. And that gave you exemption from military duty?

A. From military duty, yes, but not from all duty.

Q. Just answer the questions and we will get along much more rapidly. And that 4E classification continued throughout, didn't it? That is still your classification?

A. Yes.

Q. Then on May 23rd an order was made by Gen. Hershey. Was that called to your attention, directing the state director of Illinois to assign you to a camp?

A. Of what year?

Q. 1944?

A. I merely received an order from the draft board.

Q. You got a draft board order to report to Civilian Public Service Camp at Hill City?

A. Yes.

Q. Pursuant to that order you went to Hill City?
199 A. Yes.

Q. And reported at that camp?

A. Yes.

Q. And stayed there long enough to get a physical examination?

A. Yes.

Q. You were told in conversation with the director that your duty was to stay in the camp?

A. That my duty was to stay in camp?

Q. Weren't you?

A. One rightfully classified 4E, it is his duty to stay there. He told me that, yes.

Q. That your duty was to stay in camp. You didn't go out there with the intention of staying in the camp, did you?

A. No; I didn't go with that intention.

Q. You went out there to report and then leave the camp, regardless of what the obligations were?

A. I had no obligations.

Q. Regardless of what the law will have to say about it or may have said about it, you did not intend to stay in that camp?

A. No; it was not my intention.

Q. The answer is "no"?

A. "No;" yes.

Q. And so you left the camp?

200 A. Yes.

Q. Who gave you any authority, written or oral, to leave the camp? What person in charge of that camp?

A. I needed no authority.

Mr. PHILIP. That is all.

Mr. COVINGTON. That is all.

Mr. COVINGTON. The defendant rests, Your Honor.

Motion for verdict of guilty

Mr. PHILIP. The government at this time moves the Court to return a verdict of guilty for the reason the evidence shows clearly that the defendant is guilty, both sides having rested.

Motion for dismissal of indictment, etc.

Mr. COVINGTON. At this time, before the Court rules upon the motion offered by the government, the defendant desires to file with the Court a motion for dismissal of the indictment and for a judgment of acquittal.

And also, Your Honor, I am keenly aware of what you ruled relative to our right to defend on the grounds stated. I have prepared certain requests for Findings of Fact and Conclusions of Law, all of which would be very material if the Court were to consider those defenses. I feel it my duty to present them to the Court.

The COURT. Certainly.

Mr. COVINGTON. I don't know whether the Court wants to rule on the motions before considering these
201 findings?

The COURT. I think we will take a few minutes recess.

(Whereupon a short recess was had and upon court again convening, the following proceedings were had:)

Recital of Court

The COURT. The requested instruction, Mr. Covington, are all denied, not because they are not, a good many of them, statements of fact, but as I view the case they are immaterial. Do you gentlemen care to argue the case?

Mr. PHILIP. I don't believe I have any opening argument to make.

Mr. COVINGTON. It was not my intention to make an argument in this case. I have stated my views as to the law and since the Court has disagreed with me I shall proceed on the ruling made at the outset of the case, and there is nothing I desire to argue. The facts are undisputed and I can't change the facts.

The COURT. As I view the case, gentlemen, there is only one thing the Court can do, and that is to find the defendant guilty as charged in the indictment. He is charged here of failure to perform a duty required of him by the board. As I view the law, the action of the board, no matter what it might have been, is not available to the defense to this particular charge. I don't think this Court has any jurisdiction to consider that defense at all, and because I view the case that way, as I say,
202 there is nothing else, there is nothing left for me to do but find the defendant guilty. Upon presentation of findings pertinent to that the same will be filed.

Mr. COVINGTON. I would ask the Court what is the intention as to the time for the imposition of sentence?

The COURT. That is entirely up to the District Attorney. Whenever he moves sentence the same will be pronounced.

Mr. COVINGTON. Since I am from out of the city I would not like to have it unduly delayed. Could we have sentence in the morning?

Mr. PHILIP. That is alright with me.

The COURT. Very well.

(At this time court was in recess until 10:00 A.M., February 14, 1945, when the following proceedings were had:)

Mr. PHILIP. Your Honor, the Court having made findings the government at this time moves that a verdict of guilty be returned by the Court.

Mr. COVINGTON. May it please Your Honor, before the Court rules on the motion for verdict finding the defendant guilty, I desire to file defendant's formal exceptions to the Findings of Fact and Conclusions of Law, which I explained to Your Honor in chambers.

The COURT. Very well.

Mr. COVINGTON. Also, yesterday upon the trial the Court overruled the motion to quash and the motion
203 for dismissal of the indictment, and I have prepared formal orders on this and desire to submit them to Your Honor for signature at this time.

The COURT. Very well. Have you prepared a verdict in this case?

Mr. PHILIP. Yes, Your Honor. The verdict of the Court having been filed herein finding the defendant guilty as charged in the indictment, I now move that sentence be pronounced upon the defendant.

The COURT. By Indictment No. 1811, which was returned and filed and made a record of this court on the 6th day of December, 1944, you, Taze Hamrick Gibson, are charged with a violation of that particular federal statute commonly known as the Selective Service and Training Act, in that it is alleged in the indictment that you failed and refused to perform a certain duty required of you by the Selective Service and Training Act pursuant to the provisions of that legislation.

When arraigned upon this charge in open court you entered an oral plea of not guilty to the charge set forth

in the indictment. Thereupon the District Attorney moved the case for trial and you filed in the court a written waiver of trial by jury and consented to be tried by the Court. The District Attorney also, in behalf of the
204 government, filed a consent that the case might be tried without a jury and to the Court. Thereafter the Court heard the opening statements of counsel and considered the evidence, the greater part of which was by stipulation of facts, and after hearing the evidence and arguments of counsel and being fully advised in the premises, the Court made findings and returned a verdict of guilty as charged in the indictment.

The District Attorney has moved the case for judgment and now, before pronouncing sentence it is incumbent upon the Court to ask you if you have any legal grounds or cause to show why the judgment of the Court should not be pronounced at this time?

The DEFENDANT. I feel that I have not received a fair trial in this case because the Court contends that my reasons for leaving the camp in Hill City, South Dakota, have no bearing upon the case, but I know they do have bearing on the case because I was not obligated to stay in the camp any more than a ten year old child or an eighty year old man was obligated to stay there, because a minister of the gospel has no duty to stay in a camp like that. I might also add that I believe that my rights have been denied under the Constitution of the United States; also my God given rights to continue to preach the gospel. I am still permitted to witness before Christ Jesus and the law as Christ Jesus states in Mat-
205 thew 24, Luke 13, Mark 21, that all Christians would have opportunity to do. It might be called to the Court's attention to that even though I am being sentenced, that the fight is not once against me but against Almighty God. We are told in Matthew 25, that when anything is done to one of God's little ones it is done to Him.

The COURT. So far as any responsibility that I assume in this matter, you don't need to discuss that at all. I am aware of my responsibilities. So far as my responsibility to God is concerned that is between me and God. That is no reason why you should not be sentenced.

The DEFENDANT. My point I desire to bring out, I feel I have been unjustly tried.

The COURT. You have already stated that. That is a very common feeling among men who have been convicted of violating the law of the land. A great many of them feel they have been unjustly treated.

Mr. COVINGTON. If he is through and you are finished I would like to say a word, Your Honor.

The COURT. Very well.

Mr. COVINGTON. I feel, as I stated to Your Honor, at the outset, that this case here presents an angle under the Act and the regulations which are really not disposed of by previous decisions. I am well aware of the fact
206 Your Honor has ruled against me on that contention, but inasmuch as it involved the element of this defendant's conscience and his belief that he was exempt, and since, too, the draft board and appeals board arbitrarily and capriciously classified him, as shown by the files, although the Court is of the opinion it could not judicially review the classification in defense to the indictment because of decisions by the Courts, I feel Your Honor should take action similar to that taken by Judge Campbell, United States District Judge in Chicago, which I tried there last October, and which, incidentally, was tried before the Court without a jury, and the facts were identical with the facts in the case. Judge Campbell suspended the imposition of sentence and placed the man on probation on the condition that he continue in the performance of his full time minister work, although the facts were identical with this presented in this case. I don't urge that as any stere decisis or rule upon this Court's exercise of discretion, but I mention that case to the Court for what it may be worth. I am not standing here begging for mercy for this defendant, but at the same time it must be recognized that this type of case is essentially different from a case where a man has violated the statutes of the United States prohibiting the doing of some wrong like the commission of murder or theft. Administrative agencies have been set up here and
207 there exists a bona fide conflict between this defendant and the administrative agency, and inasmuch as I feel that the board did not properly proceed, accord-

ing to law, that Your Honor should consider that in arriving at the sentence to be imposed in this case. I have nothing further to say before sentence is pronounced.

The COURT. I am willing to state that I don't doubt the sincerity of this defendant in the position that he takes. The case is different from one or two cases of the kind that have come before me in that regard. I could not say that about all of the defendants that have appeared in cases of this kind, but I do say it unreservedly as to this defendant. If there is any merit in the contention which he makes as to the fact that he was arbitrarily classified, that, as I understand the law, could not be urged as a defense in the trial of this case. The facts are undisputed that he violated an order of the Selective Service board; the facts are undisputed that he went to the camp with the deliberate intention to violate that order. He can't urge that he didn't do it willingly, or intentionally, or knowingly. He went there knowing what his duty under that order was and went there for the sole and express purpose of deliberately violating it for the purpose of testing the correctness of his contention as to what his rights under the law really were. If he had desired to avail himself of the contention he had
208 opportunity to do it. He has not been denied the right to present the defense in support of his constitutional rights. I am not prepared to say what the result would have been had he proceeded as the law contemplates that he should proceed. If he had stayed at that camp and got a writ of habeas corpus, and if the facts are as he contends they are, and which I have no right or reason to doubt at this stage of the proceedings, if those were the facts I have no doubt but what a court would have taken them into consideration and his constitutional rights would have been considered in that proposition. But under the law as expressed by the highest courts in the land, there isn't any room for the contention that this Court has a right to consider the action of that board as a defense to the violation of this regulation. There can be no question as to that.

Having given the matter due consideration, viewed from every angle, I see no reason why I should make any exception as to this defendant in the penalty pronounced.

He deliberately refused to comply with the order of the board for the purpose of testing the question out. He was willing to abide by the orders of the Court in order that that question might be decided. I see no reason why he should be placed in any different category than the man who merely violates because he does not think they have any right to make him go to camp. He occupies the same position.

209 It is the judgment of the Court, that you, Taze Hamrick Gibson, be committed to the custody of the Attorney General of the United States for imprisonment for and during the full term and period of five years, and that pending the execution of the judgment you be committed to the custody of the United States Marshal.

Mr. COVINGTON. Now, may it please the Court, at this time I file with the clerk the defendant's notice and grounds for appeal, together with the required number of copies, and I also move the Court at this time to admit this defendant to bail pending the disposition of this appeal which we are taking in good faith, and which is not taken for the purpose of delay.

(Here followed argument of counsel in support of the above motion.)

The COURT. The question that controls the Court on the matter of appeal is not the question of whether the Court is satisfied it will be affirmed or not. The question that the Court is governed by is whether or not, in the opinion of the Court, there is a substantial question. That is the only question. This Court will not grant any bail. I won't do it because I don't think I have any right to grant it.

Mr. COVINGTON. I take exception to Your Honor's ruling.

The COURT. Exception allowed.

210 Mr. COVINGTON. At this time I would like to get an order from the Court to the Clerk directing that photostatic copies be sent up in their original form.

The COURT. Is there anything in the rules against that?

The CLERK. That will leave our original file without those exhibits.

Mr. COVINGTON. They will be returned upon the disposition of the appeal.

I would like also to have this understanding with the Court: That the stenographer present the bill of exceptions in my behalf to Your Honor, when they are drawn up, for approval by Your Honor, and when they are presented, if they meet the situation, that you and the District Attorney sign them and order them filed with the Clerk in my absence.

The COURT. In view of the fact, gentlemen, that the procedure, as you indicate you desire to be had, is not in strict accordance with the rules on appeal, wouldn't it be well for you two gentlemen to enter into a stipulation, waiving the necessary notice and one thing and another, and providing just how the record should be settled. I suggested that because it is highly important if you get into the Court of Appeals, they will consider every question, and it is well to have no question come up as to any irregularity in the settlement of the record
211 which might preclude the disposition of the case in the appellate court.

Mr. PHILIP. It strikes me that in settling the bill of exceptions that he should follow the procedure laid down by the rules and be called in by the Court to settle them.

Mr. COVINGTON. That is necessary when counsel cannot agree on the matter. Here we have a federal court stenographer who is going to prepare the record as quickly as possible. I am willing to waive notice. I am not going to insist on the five day notice and all that sort of thing required by the rules, and if counsel agrees to waive them I am willing to waive them. What is the use of delaying the matter?

The COURT. I don't see any necessity for that?

Mr. COVINGTON. At this time the defendant comes into Court and hereby waives any of the rights and requirements relative to the issuance of notice and the having of a hearing before the United States District Judge relative to the settlement, and agrees if, as and when the court stenographer prepares the transcript of the testimony and proceedings in this case, that they shall be presented to the United States District Judge and the United States Attorney for their approval, and when so approved by the Judge and the District Attorney, that they shall be

signed by the Judge and filed with the papers in the
212 proceedings, without complying with the formalities required by the rules of the Supreme Court of the United States in the issuance of notice and having a hearing for the setttlement of the bill of exceptions.

The COURT. I don't think there is anything wrong about your having all of the record before the Court of Appeals.

Mr. COVINGTON. The reason I make it at this time is on account of the fact I am non-resident counsel. As long as he is in jail and I want to get him out on bond as quickly as possible, I think it is incumbent upon me to get an appeal through in this case with despatch.

The COURT. It is absolutely alright. I think you are right in the position you take.

Mr. PHILIP. It is alright with me.

Mr. COVINGTON. I am entirely satisfied and I know it will be agreeable to the Circuit Court of Appeals under the circumstances. All I want is the complete record up there.

Reporter's certificate

213 I hereby certify that the within and foregoing transcript of trial proceedings is a full, true and correct transcript of my shorthand notes taken at the time of the trial of said cause and by me personally transcribed.

BEAT. O. COLKINS, *Reporter.*

214 In the District Court of the United States
for the District of South Dakota.

[Title omitted.]

Order settling bill of exceptions

I, the undersigned United States District Judge, who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, objections, rulings and exceptions thereto, occuring upon the trial of said cause and not heretofore a part of the record herein,

including all evidence adduced at the trial; and I further certify that the exhibits set forth or referred to, or both, in the foregoing bill of exceptions, constitute all of the exhibits offered in evidence at the said trial, and I hereby make all of said exhibits a part of the foregoing bill of exceptions; and I hereby settle and allow the foregoing bill of exceptions as a full, true and correct bill of exceptions in this cause and order the same filed as part of the record herein, and further order the clerk of this court to forward with the bill of exceptions, all of the said exhibits not set forth therein; and to transmit said entire bill of exceptions including all exhibits whatsoever, to the Circuit Court of Appeals for the Eighth Circuit.

215 I further certify that the foregoing bill of exceptions is presented, settled and allowed within the time prescribed for that purpose.

Dated this 23rd day of February 1945.

By the Court:

A. LEE WYMAN, *Judge.*

Service admitted Feby. 26, 1945.

GEORGE PHILIP; *U. S. Attorney.*

Filed February 23, 1945.

ROY B. MARKER, *Clerk.*

247 In United States District Court

Docket 3049

THE UNITED STATES

vs.

TAZE HAMRICK GIBSON

Docket entries

Dec. 6, 1944 Presentment entd. and Indictment filed 12-6-44

Dec. 6, 1944 Application filed 12-6-44

Dec. 6, 1944 Order transferring case filed 12-6-44

Dec. 5, 1944 Ent. Order fixing bail in sum of $5000.00

Dec. 6, 1944 Filing Praec. for Warrant, etc.
Dec. 6, 1944 Ent. Order for Warrant to issue
Dec. 6, 1944 Issuing Warrant Fur. copy of Warrant
Dec. 6, 1944 Warrant retd., filed, end. by Mar. with non est return
Dec. 6, 1944 Filing Praec. for C. copy of Ind. and Warrant Fur. same
Dec. 7, 1944 Filing Bail Bond Ent. Approval of same
Jan. 26, 1945 Filing Motion for Sub. for witnesses for Dfdt. at cost of U. S.
Jan. 26, 1945 Filing Order denying above Motion, Ent. same Attesting
Jan. 30, 1945 Filing Praec. for Sub. for John J. McKenna Issuing Sub. C. copy for service
Jan. 30, 1945 Filing Praec. for Sub. for Atlee Beechy—duces tecum Issuing Sub. C. copy for service
Feb. 1, 1945 Filing Affidavit of Taze Hamrick Gibson
Feb. 1, 1945 Filing Motion to Quash Indictment
Feb. 3, 1945 Sub. for Atlee Beechy retd., filed, end. by Mar. as executed
Feb. 5, 1945 Sub. for John J. McKenna retd., filed, end. by Mar. as executed
Feb. 5, 1945 Filing Praec. for Sub. for Paul G. Tschetter Issuing Sub. C. copy
Feb. 10, 1945 Sub. for Paul G. Tschetter retd., filed, end. by Mar. as executed
248 Feb. 13, 1945 Filing Application
Feb. 13, 1945 Filing Order for change of place of trial Ent. same Attesting
Feb. 13, 1945 Filing Waiver of Jury Trial
Feb. 13, 1945 Filing Consent of Plff. to filing of Waiver of Jury Trial
Feb. 13, 1945 Filing Stipulation for trial at Sioux Falls on Feb. 13-45
Feb. 13, 1945 Ent. hearing on Motion to Quash
Feb. 13, 1945 Ent. Arr. & Plea—Not Guilty
Feb. 13, 1945 Filing Plff's Ex. 1 being Questionnaire
Feb. 13, 1945 Filing Plff's Ex. 2 being Assignment to work

Feb. 13, 1945 Ent. Plff's Ex. 3 being Order to Report for work

Feb. 13, 1945 Filing Dfdt's Ex. A being copy of letter dated 8-18-44 attached to letter of Paul G. Tschetter to J. N. Weaver, Natl. Service Board, Washington

Feb. 13, 1945 Filing Dfdt's. Ex. B being Letter dated 12-5-44 Walfred Lindstrom to Atlee Beechy, copy of Report of Physical Examination and Induction of Taze Gibson

Feb. 13, 1945 Filing Dfdt's Ex. C being Personal Record of Taze Hamrick Gibson dated 8-24-44

Feb. 13, 1945 Filing Dfdt's Ex. D being Individual Record of Campee

Feb. 13, 1945 Filing Dfdt's Ex. E being Statement made by Paul G. Tschetter dated 8-28-44

Feb. 13, 1945 Filing Dfdt's Ex. F being Letter dated 8-18-44 Taze Hamrick Gibson to Paul G. Tschetter

Feb. 13, 1945 Ent. Order that Dfdt's Exs. A to F may be withdrawn upon substitution of photostatic copies

Feb. 13, 1945 Swearing witnesses Atlee Beechy, Paul G. Tschetter John J. McKenna on behalf of Plff.

Feb. 13, 1945 Swearing witnesses Alice Simpson, Taze Hamrick Gibson on behalf of Dfdt.

Feb. 13, 1945 Ent. Trial Proceedings

Feb. 13, 1945 Filing Motion for Dismissal and for Judgment of Acquittal

249 Feb. 13, 1945 Filing Request for Findings and Conclusions No. 1

Feb. 13, 1945 Filing Request for Findings and Conclusions No. 2

Feb. 13, 1945 Filing Request for Findings and Conclusions No. 3

Feb. 13, 1945 Filing Request for Findings and Conclusions No. 4

Feb. 13, 1945 Filing Request for Findings and Conclusions No. 5

Feb. 13, 1945 Filing Request for Findings and Conclusions No. 6
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 7
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Feb. 13, 1945 Filing Request for Findings and Conclusions No. 9
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 10
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 11
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Feb. 13, 1945 Filing Request for Findings and Conclusions No. 13
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 14
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 15
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 16
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Feb. 13, 1945 Filing Request for Findings and Conclusions No. 20
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Feb. 13, 1945 Filing Request for Findings and Conclusions No. 25
Feb. 13, 1945 Filing Request for Findings and Conclusions No. 26

Feb. 13, 1945 Filing Request for Findings and Conclusions No. 27

Feb. 14, 1945 Filing Findings of Fact. Ent. same Attesting

Feb. 14, 1945 Filing Exception to Findings of Fact

Feb. 14, 1945 Filing Order overruling Motion to Quash Indictment Ent. same Attesting

250 Feb. 14, 1945 Filing Order overruling Motion to Dismiss Indictment and for Judgment of Acquittal Ent. same Attesting

Feb. 14, 1945 Filing Verdict. Ent. same

Feb. 14, 1945 Ent. Trial Proceedings

Feb. 14, 1945 Filing Sentence (5 yrs. custody Atty. Gen.) Ent. same. Attesting

Feb. 14, 1945 Fur. 2 C. copies of Sentence for service

Feb. 14, 1945 Filing Notice of Appeal in Duplicate with Admission of Service endorsed thereon

Feb. 14, 1945 Mailing Duplicate Notice of Appeals and List of Docket Entries to U. S. Circuit Court of Appeals

Feb. 14, 1945 Filing Order that Exs. 1 to 3 and A to S-1 be forwarded to Clerk of Circuit Court of Appeals Ent. same. Attesting

Feb. 14, 1945 Filing Designation of Record on Appeal

Feb. 16, 1945 Filing Photostatic copies of Dfdt's Ex. A, B, C, D, E, and F

Feb. 21, 1945 Filing Receipt for Exs. A, B, C, D, E, and F

Feb. 23, 1945 Filing C. copy of Order of Circuit Court of Appeals denying Motion for Bail pending Appeal. Ent. same

Feb. 23, 1945 Filing Bill of Exceptions. Ent. fact of same being settled and allowed

Feb. 24, 1945 Filing Assignment of Errors

251 In United States District Court

[Title omitted.]

Designation of the record on appeal

Filed Feb. 14, 1945

To Mr. Roy D. Marker, *Clerk,*
United States District Court,
Sioux Falls, South Dakota.

The above named defendant has duly appealed to the United States Circuit Court of Appeals for the Eighth Circuit. You shall prepare a transcript of the record according to law containing the following documents, to wit,

1. The indictment.
2. The motion to quash the indictment, affidavit of Gibson.
3. The order denying motion to quash.
4. The motion for subpoenas.
5. The order denying motion for subpoenas.
6. The motion for a dismissal of the indictment and for a judgment of acquittal.
7. The order denying motion for a dismissal of the indictment and for a judgment of acquittal.
8. The defendant's requests for findings of fact and conclusions of law numbers 1 to 27 inclusive.
9. The findings of fact and conclusions of law adopted by the court.

252 10. Defendant's exceptions to the findings of fact and conclusions of law & verdict of the court.

11. The judgment and sentence of the court upon such findings and conclusions.
12. The notice of and grounds for appeal.
13. The assignments of error.
14. The clerk's docket entries.
15. The bill of exceptions as prepared by the official court stenographer and settled by the judge.
16. The exhibits referred to in the bill of exceptions shall not be copied but the photostatic copies received in evidence shall be sent up to the Circuit Court of Appeals

in the form they were offered in evidence and marked by the stenographer.

17. The Clerk's certificate.

The above and foregoing constitute the entire record made in your court in this case and when the transcript is prepared in accordance with this designation you shall promptly forward it to the Clerk of the United States Circuit Court of Appeals. You are informed that a copy of this designation has been delivered to the United States Attorney.

Dated February 14, 1945.

Hayden C. Covington,
HAYDEN C. COVINGTON,
Attorney of Record for Defendant-Appellant,
117 Adams Street, Brooklyn, New York.

253 Service Admitted Feby. 14, 1945.

GEORGE PHILIP,
United States Attorney.

254 [Clerk's certificate to foregoing transcript omitted in printing.]

255 In United States Circuit Court of Appeals,
Eighth Circuit

No. 13049

TAZE HAMRICK GIBSON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of South Dakota

Mr. Hayden C. Covington for Appellant.

Mr. Irving S. Shapiro, Attorney, Department of Justice (Mr. George Philip, United States Attorney, Mr. Nathan T. Elliff, Special Assistant to the Attorney General, and Mr. Robert S. Erdahl, Attorney, Department of Justice, were with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and THOMAS, Circuit Judges.

Opinion

June 15, 1945.

SANBORN, Circuit Judge, delivered the opinion of the Court.

The appellant, a registrant under the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C.A. Appendix, §§ 301–318) was indicted for violating Section 11 of the Act[1] by deserting from the Civilian Public Service Camp at Hill City, South Dakota, to which he, as a conscientious objector, had been assigned by his local board to perform work of national importance. He entered a plea of not guilty, waived a jury, and, after a trial by the court, was found guilty and sentenced. He has appealed. His main contention is that the District Court erred in ruling that the propriety of his classification as a conscientious objector was not an issue in the case. His proffered defense was that he was in fact exempt from service, being a "regular or duly ordained" minister of religion [§ 5(d) of the Act (50 U. S. C. A. Appendix, § 305(d))]; that he should have been so classified; that the order assigning him to the camp was therefore invalid; and that he had failed to perform no duty which he was legally required to perform.

256

The only difference between this case and the case of Falbo v. United States, 320 U. S. 549, (relied upon by the government) is that Falbo failed to obey an order to report for assignment to work of national importance (p. 550 of 321 U. S.), while the appellant here obeyed the order to report, so as to complete the administrative process incident to induction. After being examined by the camp doctor and being found to be physically fit to perform work at the camp, the appellant advised the camp director that he (appellant) was a minister of religion, that he had been improperly classified as a conscientious objector, and that he would therefore refuse to work. He then left the camp, without authority. In the Falbo case, the Supreme Court rejected the contention that the alleged misclassification of Falbo by the local board was an issue. The Supreme Court pointed out that

257

[1] Section 11 (50 U.S.C.A. Appendix, §311) imposes penalties for wilful failure or neglect to perform a duty required by the Act or by rules or regulations made pursuant to the Act.

the order to report for work of national importance is not the equivalent of acceptance for service, that the conscientious objector may be rejected at the civilian public service camp, and that the order "is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." (P. 553 of 320 U. S.) The court then said (p. 554 of 320 U. S.):

"* * * Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

"We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. * * * Surely if Congress had intended to authorize interference with that process [of selection] by intermediate challenges of orders to report, it would have said so."

The appellant infers from this language that if Falbo, instead of refusing to obey the intermediate order to report to the Civilian Public Service Camp for induction, had obeyed that order, and, after being accepted at the camp, had deserted and had then been indicted for failure to perform a duty required by the Act, he, having
258. completed the selective process, would have been entitled to assert as a defense that he was a minister and had been erroneously classified. The appellant cites Billings v. Truesdell, 321 U. S. 542, in support of this theory. The question in the Billings case was whether Billings, who had filed a petition for habeas corpus alleging that he was not a member of the armed forces of the

United States, had been actually inducted into the army and was therefore subject to military jurisdiction. That case draws the distinction between "acceptance" for military service and "induction" into such service, but has little, if any, relevancy to the appellant's situation.

The government argues that, being subject to the Selective Training and Service Act, the appellant could not test the validity of his classification by deserting from the camp to which he had been assigned, and that his remedy was to submit to detention and then to apply for a writ of habeas corpus. The District Court was right in accepting that as the law. One who is subject to the Act may not defy it. If he contends that he was erroneously classified, he may, after induction, obtain through habeas corpus a hearing upon the legality of his classification. Hirabayashi v. United States, 320 U. S. 81, 108, and cases cited; Bronemann v. United States, 8 Cir., 138 F. 2d 333, 337; Giese v. United States (App. D.C.) 143 F. 2d 633, 634–635, affirmed — U. S. —, 65 S. Ct. 437; Biron v. Collins, 5 Cir., 145 F. 2d 758; United States v. Flakowicz, 2 Cir., 146 F. 2d 874, certiorari denied, — U. S. —, 65 S. Ct. 1086; United States v. Rinko, 7 Cir., 147 F. 2d 1, certiorari denied, — U. S. —, 65 S. Ct. 1086; Smith v. United States, 4 Cir., 148 F. 2d 288, 291, certiorari granted, — U. S. —.

The contention that the Act is unconstitutional if construed so as to require the appellant to submit to detention and then to apply for a writ of habeas corpus
259 as a condition precedent to a judicial review of the action of the local board, we think merits no discussion in view of the cases cited.

The judgment appealed from is affirmed.

260 In United States Circuit Court of Appeals,
Eighth Circuit

No. 13049. May Term, 1945

TAZE HAMRICK GIBSON, APPELLANT

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the District of South Dakota

Judgment

June 15, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

And it is further ordered by this Court that the defendant in the said District Court do surrender himself to the custody of the United States Marshal for the District of South Dakota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District.

261 In United States Circuit Court of Appeals,
Eighth Circuit

[Title omitted.]

Docket entries

Feb. 16, 1945—Docketed on Duplicate Notice of Appeal.
Feb. 16, 1945—Duplicate Notice of Appeal.
Feb. 16, 1945—Statement of Docket Entries.

Feb. 16, 1945—Notice of and Petition for Bail pending appeal or for order advancing cause for submission.

Feb. 19, 1945—Order: Application Appellant for bail pending appeal denied and alternative application for advancement of hearing of appeal granted and case to be set at May Term, 1945, etc.

Feb. 20, 1945—Issue Certified copy order of Feb. 19, 1945, to Clerk of District Court.

Mar. 2, 1945—Appearance Appellee.

Mar. 5, 1945—Transcript of record filed.

Mar. 12, 1945—Motion for leave to proceed further in forma pauperis, and Notice.

Mar. 12, 1945—Affidavit of Appellant in forma pauperis.

Mar. 20, 1945—Order: Appellant granted leave to present case on typewritten record and briefs, etc.

Mar. 22, 1945—Transfer to Docket for May Term, 1945.

Mar. 23, 1945—Appearance Appellant.

Apr. 10, 1945—Brief Appellant (type).

Apr. 10, 1945—Appendix for Brief Appellant (type).

Apr. 9, 1945—Motion appellant for leave to file extended brief.

Apr. 10, 1945—Order: Leave granted appellant to file brief containing 102 pages, on motion.

Apr. 30, 1945—Brief of United States.

May 15, 1945—Appearance Appellee.

May 15, 1945—Enter order argued and submitted to Judges Sanborn, Woodrough and Thomas.

June 15, 1945—Opinion, Judge Sanborn.

June 15, 1945—Two copies opinion sent to counsel.

June 15, 1945—Judgment: Judgment and sentence affirmed without costs to either party in this Court.

July 6, 1945—Praecipe for transcript for Supreme Court, U. S.

July 10, 1945—Order: Clerk directed to transmit transcript of record and exhibits to Supreme Court, U. S., etc.

262 In United States Circuit Court of Appeals,
Eighth Circuit

[Title omitted.]

Praecipe for transcript of record upon petition for writ of certiorari

Filed July 6, 1945

To The Honorable [illegible] Clerk of Said Court:

Now comes Taze Hamrick Gibson and shows that he proposes to file a petition for writ of certiorari with the Clerk of the Supreme Court of the United States, together with a Motion for Leave to Proceed in Forma Pauperis, and hereby requests the Clerk to prepare immediately and forward to the Clerk of the Supreme Court of the United States the original transcript of the record filed in the office of the Clerk of the United States Circuit Court of Appeals by the Clerk of the United States District Court for the District of South Dakota, together with a copy of all other proceedings had in the United States Circuit Court of Appeals, all of which is recapitulated as follows, to wit:

(1) Original transcript of record filed in this cause

(2) Judgment and order of affirmance entered in this court on June 15, 1945

(3) Copy of opinion of the court dated June 15, 1945

(4) Copy of docket entries of this court showing the dates of filing of all papers and proceedings had in this cause

(5) Copy of this praecipe for transcript of record upon petition for writ of certiorari

(6) Certificate of Clerk of the United States Circuit Court of Appeals

262 WHEREFORE the Clerk is requested to immediately prepare the transcript of the record as above designated and forward same to the Clerk of the Supreme Court of the United States.

HAYDEN C. COVINGTON,
Attorney for Taze Hamrick Gibson.

CERTIFICATE

STATE OF NEW YORK, *County of Kings, ss:*

This is to certify that the undersigned attorney of record for Taze Hamrick Gibson has this day caused a copy of the above praecipe for transcript of the record upon petition for writ of certiorari to be served upon the attorney of record for the United States of America by mailing said copy to Mr. George Philip, United States Attorney, Rapid City, South Dakota, in the manner required by law.

Hayden C. Covington.
HAYDEN C. COVINGTON.

Subscribed and sworn to before me this 3rd. day of July 1945:

William K. Jackson,
WILLIAM K. JACKSON,
Notary Public Kings County
Kings Co. Clk's No. 97, Reg. No. 62–37.
Commission Expires March 30, 1947.

263 In United States Circuit Court of Appeals,
Eighth Circuit

[Title omitted.]

Order directing Clerk to transmit transcript of record and exhibits to Supreme Court, U. S., etc.

July 10, 1945

Judgment and sentence of the District Court in this case was affirmed by this Court and counsel for appellant has now filed a praecipe for transcript of record for filing in the Supreme Court of the United States with a petition for writ of certiorari wherein, among other things, he requests that the Clerk forward to the Supreme Court of the United States the original transcript of the record from the District Court as filed on the appeal in this Court. Appellant was granted leave by this Court to present his appeal on the typewritten transcript of the

record from the District Court and therefore the record was not printed.

The Clerk of this Court is by the Court hereby ordered to transmit to the Clerk of the Supreme Court of the United States said typewritten transcript of the record with requested parts of the proceedings in this Court and also the original exhibits which were received from the Clerk of the District Court with the transcript of the record. The Clerk is also directed to request that the transcript of the record and original exhibits be returned to this Court when they have answered their purpose in the Supreme Court.

Issuance of the mandate of this Court which is now due is by the Court hereby stayed for a period of twenty days from and after this date, and if within said period there is filed in the Supreme Court of the United States a petition for writ of certiorari and accompanying record and brief in support and a certificate from the Clerk of the Supreme Court of the United States is received by the Clerk of this Court within said period the issuance of mandate will then be withheld until final disposition of the case in the Supreme Court.

264 [Clerk's certificate to foregoing transcript omitted in printing.]

265 Supreme Court of the United States

Order granting motion for leave to proceed *in forma pauperis*

October 22, 1945

On consideration of the motion for leave to proceed herein in forma pauperis.

It is ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice JACKSON took no part in the consideration or decision of this motion.

266 Supreme Court of the United States

Order allowing certiorari

Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

[Endorsement on cover:] In forma pauperis. Enter Hayden C. Covington. File No. 49924. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 221. Taze Hamrick Gibson, Petitioner *vs.* The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 13, 1945. Term No. 221 O.T 1945.

U. S. Government Printing Office 1945—674310

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 24 1945
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 221 23

TAZE HAMRICK GIBSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF

HAYDEN C. COVINGTON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 221

TAZE HAMRICK GIBSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF

Jurisdiction

This Court has jurisdiction of this case under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934. The judgment of the Circuit Court of Appeals was entered June 15, 1945. [96] [1] Petition for writ of certiorari

[1] All figures in this brief appearing in brackets denote pages of the printed record.

was filed July 13, 1945, and was granted October 22, 1945. [101]

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. [92-95] It is reported at 149 F. 2d 751.

Statute and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 627.24, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.2, 651.3, 651.7, 651.8, 651.10, 652.1, 652.2, 652.11, 652.12, and 652.13 of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

1. Does reporting at the civilian public service camp pursuant to order and refusing to stay after acceptance upon a physical examination constitute exhaustion of the administrative process so as to qualify petitioner for a defense that the action of the administrative board is illegal, where he is charged with desertion from a civilian public service camp?

2. Did the trial court err in holding that it could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided by the court to whether or not petitioner knowingly failed to stay at the camp as specified in the order to report?

3. Did the courts below err in construing the Act so that the only method of attack against an illegal and unconstitutional action of the draft board was by application for writ of habeas corpus?

4. Where there is undisputed evidence that the petitioner is a minister of religion within the meaning of Section 5 (d) of the Selective Training and Service Act and petitioner is classified as liable for training and service upon grounds not allowed by the Act, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally in denying his exemption from training and service?

5. May the petitioner who is a minister of religion, exempt from all training and service by provision of the Act, show in defense to the indictment that his constitutional rights have been violated by the board's action in excess of its jurisdiction or authority and contrary to the Act and Regulations?

6. Did the trial court err in refusing petitioner the right to show, and in refusing to consider, that the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution

by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

7. Does the construction placed upon the Act and Regulations by the court below, requiring petitioner to report and stay at the camp, and apply for a writ of habeas corpus as a condition precedent to judicial review of the illegality and unconstitutionality of the action by the board, violate Clause 3, Section 9 of Article I, and Article III, of the United States Constitution and the Fifth and Sixth Amendments thereto?

8. Did the courts below commit reversible error in failing to hold that petitioner could not properly be tried in the district of South Dakota because venue was in the district of Arkansas where the controversy arose and all the witnesses resided?

9. Is the construction placed on the Act and Regulations requiring petitioner to go into another district to exhaust his administrative remedies under the Act, out of the district where the controversy arose and where the witnesses are situated, and there undergo trial for refusal to do service, unreasonable and unconstitutional because of placing an indigent defendant in a trap where his witnesses and evidence are unavailable?

10. Did the trial court err in denying petitioner's motion to quash the indictment, motion for a finding of not guilty and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for findings of fact and conclusions of law, all of which pertained to the illegality of the administrative order?

Statement of Case

Form and History of Action

This criminal action was instituted in the District Court of the United States for the district of South Dakota by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-4] The indictment charges that petitioner, on August 23, 1944, reported at a civilian public service camp at Hill City, South Dakota, and was enrolled there for work of national importance. It is further alleged that on August 28, 1944, he left said camp with the intention of remaining away. The indictment charges that such conduct constituted a violation of section 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. § 311). [2-3]

Before pleading to the indictment petitioner duly filed and presented his motion to quash the indictment. [8-15] It was overruled by the court. [19] Thereafter petitioner pleaded "not guilty" on February 13, 1945. [29] A trial by jury was waived and the case was heard by United States District Judge A. Lee Wyman, for the district of South Dakota. [29] The trial without jury began on February 13, 1945. [29] At the close of all the evidence, petitioner moved for dismissal of the indictment, a judgment of acquittal and a finding of "not guilty", stating extensively his reasons. [15-19] On denial of that motion petitioner excepted. [20, 77-78] At the close of all the evidence petitioner submitted to the court his requested findings and conclusions, all of which were refused and exceptions allowed. [78]

The court found petitioner guilty [21-22, 23-24, 78]. Petitioner excepted to the finding [22-23]. He was sentenced to five years and committed to the custody of the Attor-

ney General in such place of confinement as may be designated [24-25, 83]. Petitioner served and filed his written notice of appeal [25, 26, 27, 83]. He timely filed his assignments of error which supported each ground of his appeal. In due course the cause was argued and submitted to the United States Circuit Court of Appeals for the Eighth Circuit [96]. The judgment of conviction was affirmed by that court June 15, 1945 [96, 97].

Facts

Petitioner, now 23 years of age, registered under the Selective Training and Service Act of 1940 on June 30, 1942, with local board A of El Dorado, Arkansas [30, 64]. He was assigned order number 12064 with said board [30]. He timely filed, on October 12, 1942, a Selective Service questionnaire answering questions required of him and in Series VIII thereof he made declaration pertaining to his status as a minister of religion [30-31, 64].

In his questionnaire he stated:

"I have completed 8 years of elementary school and 1 year of high school. I have had the following schooling other than elementary and high school: Divinity school; course of study, Ministry; have attended a full two years and still attend.

"The job I am now working at is minister of religion. I do the following kind of work in my present job: Preaching the Kingdom of God for which Jesus taught his followers to pray (Matthew 6:10).

'I have also worked at the following occupations other than my present job, during the past 5 years: Farm laborer, farming from 1934 to 1940. My usual occupation, or the occupation for which I am best fitted, is ministry work.

'I prefer the following kind of work: Ministry work. I would not consider accepting a job which would require me to move away from my present home.

'I am a minister of religion. I do customarily serve as a minister. I have been a minister of Jehovah's witnesses since June 1938. I have been formally ordained. My ordination was performed on September 9, 1938 by Brother Miller at Birmingham, Alabama. I am a student preparing for the ministry in a theological or divinity school. I am attending the Watchtower Bible and Tract Society, which was established before September 16, 1939, and is located at 117 Adams Street, Brooklyn, New York'' [30, 31, 64] (Government's Exhibit 1).

Petitioner in his questionnaire claimed classification of IV-D, the classification given ministers of religion under Section 5(d) of the Act. He showed that he devoted substantially full time to the performance of his work as a minister of religion [30, 64].

The local board, on November 6, 1942, denied his claim for exemption and placed him in Class I-A, as liable for training and service in the armed forces [30]. He duly and timely appealed [30]. The board of appeal, on May 8, 1943, upon consideration of his draft board file, reversed the classification of the local board and placed petitioner in Class IV-E, thereby denying his claim for exemption from training and service as a minister of religion under Section 5(d) of the Act and making him liable for service in a civilian public service camp as a conscientious objector [30] (Government's Exhibit No. 1).

Petitioner wrote to the State Director and requested him to appeal the determination to the President and to stay the induction process [50-51, 69]. The State Director did not take action. The National Director was requested to take action in behalf of petitioner by appealing the determination to the President [50-51, 69]. On a review of the case, the National Director refused to take an appeal [69]. On May 23, 1944, petitioner was assigned to do work in a civilian public service camp [30, 31]. On

or about September 1, 1943, petitioner was commanded to appear on September 22, 1943, for a preinduction physical examination [51, 69]. In 1944 he was again given such an examination and later notified by his local board that he had been found "physically fit" and accepted for "civilian public service" [51-52, 69].

On August 8, 1944 the local board mailed to him an Order to Report for Work of National Importance, that commanded him to appear at the local board in Carlinville, Illinois, at 2 p. m. on August 21, 1944 [30, 31, 69]. On that date petitioner did appear at that local board and received his transportation to the camp in South Dakota [30, 70]. Thereupon the petitioner proceeded from the local board to the Civilian Public Service Camp at Hill City, South Dakota, where he remained until August 28, 1944, when he was given a physical examination [30-31, 70]. On arrival at the camp petitioner found that the camp director and camp physician were away [70]. After staying at the camp three days without performing any work whatever, petitioner finally saw the camp physician upon his return [70-71]. He was examined and found physically acceptable, thus completing his administrative remedies [70-71]. He did not report to do work of national importance [22, 30]. The civilian public service camp reported that petitioner appeared at the camp to complete the administrative processes incident to induction (Petitioner's Exhibit A) [33-34]. The camp records also showed that petitioner was a missionary evangelist engaged in preaching the gospel of God's kingdom as a direct representative of the Watchtower Bible and Tract Society and that he was ordained in 1938 and had been engaged in the ministry work full time since 1940 (Petitioner's Exhibit C) [36]. The report of the examining physician was received in evidence and showed that petitioner had been

declared acceptable and found to be physically fit (Petitioner's Exhibit D) [36].

After exhausting his administrative remedies on the completion of the physical examination petitioner talked to the camp director immediately after arrival of the director at the camp [33, 71]. The first thing petitioner did was to hand to the director a typewritten letter reviewing the history of his work as a minister and the history of his efforts to obtain an exempt classification as a minister of religion from the draft boards [33, 71]. Petitioner then told the director that he was in a covenant with Almighty God JEHOVAH to do His will by preaching the gospel of God's Kingdom, which must be proclaimed to all nations. He also informed the director that he did not ask the draft boards to give him a "conscientious objector" classification, but that the undisputed evidence in his draft board file showed he should have been given the exempt classification of IV-D which is given to all ministers of religion [33-34, 71-72]. Moreover, he pointed out that he had obeyed every order of the boards including their unlawful order to report to the camp [70-71]. He further informed the director that, as stated in the letter, he could not stay at the camp [31-34, 71-72]. The director told him that he would be prosecuted if he left the camp [31-38, 74-75]. Petitioner replied that if he was it would not be the first time a Christian had been punished for following Christ Jesus; that Christ Jesus had been unlawfully charged, tried and convicted because of keeping His covenant with Jehovah God, as well as His apostles; that since Jesus' apostles refused to step aside from their preaching work and follow the command of the governments of their day, so also he (petitioner) as a Christian must follow in their footsteps [74-75]. He also pointed out to the director that he must obey God rather than the unlawful

commands of the draft boards and the operators of the camp; that he stood in the same position of the three Hebrews who, when ordered to bow down and worship the golden image in ancient Babylon, firmly refused and for such refusal were thrown into the burning fiery furnace [74-75]. Petitioner said that he would say, as did the three faithful Hebrews, that if God sees fit to deliver him he will do so but that *if God sees fit not to deliver* him he, nevertheless, will continue to obey God regardless of the consequences [74-75].

Before leaving, petitioner told the camp director that he had reported to the camp only to exhaust the administrative process in order to obtain correction of the illegal classification of the draft boards [38-39]. He then asked the director to give him a statement showing that he had reported in camp on August 23, 1944 and that after completing the administrative process, without performing any work, he left the camp voluntarily (Petitioner's Exhibit E) [33-34]. Upon receiving this statement from the director, petitioner left the camp [33-34, 38-39].

Thereupon petitioner returned to his missionary field and resumed his evangelistic ministry in Indiana. He was arrested by an agent of the Federal Bureau of Investigation on December 2, 1944 under a charge of violating the Selective Training and Service Act of 1940 [44, 45-46, 65].

Petitioner testified that he attended a divinity school, preparing to become a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a religious organization recognized by the Selective Service System, from 1935 to 1938 [61]. That he had been a minister of that organization since 1938 and that he had been a full-time pioneer minister, devoting substantially his full time, since the fall of 1940 [61-62]. That he was engaged primarily in carrying out his Christian duties as a minister

of the gospel by engaging in evangelistic work of calling upon the people from house to house, locating people of good-will toward Almighty God and the work of Jehovah's witnesses and in arranging for conduct of Bible studies in homes of the people interested in that work, and by public street preaching by distribution of literature containing Bible sermons, in Macon, Mississippi; El Dorado, Arkansas; Enid, Oklahoma; Verdun, Illinois; and Clinton, Indiana [59-66]. That he also performed regular ministerial duties in connection with the congregation of Jehovah's witnesses located in El Dorado, Arkansas, where he each week delivered sermons and performed ministerial duties to that congregation as its minister and as assistant to the presiding elder of the congregation [59-63, 64, 65-66].

How Issues Raised

By motion to quash, petitioner challenged the constitutionality of the criminal sanctions clause of the Act because if the only means of challenging the illegality of the action of the draft boards was by writ of *habeas corpus*, it deprived him of his constitutional rights of due process and converted the Act into a "bill of attainder" contrary to the Constitution [9]. Moreover, in the same motion he asserted that the Act and Regulations had been construed so as to require him to report in South Dakota to exhaust his administrative remedies, forcing him to stand trial in a strange, far-away district and State where the controversy did not arise, making it impossible for him to obtain compulsory subpoena powers over his witnesses, all of which was arbitrary, unjust, unreasonable and depriving him of his rights and liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution [8-11]. The motion to quash was overruled, to which petitioner excepted [19, 29].

Although the trial court allowed the Government to introduce into evidence the questionnaire, documentary evidence attached to it by petitioner was excluded from evidence [31, 48-52]. All material and relevant documents filed in petitioner's cover sheet with the draft board that were considered by the administrative agency in arriving at his final classification, whereby he was denied his exemption from duty as a minister of religion, were identified and offered in evidence [48-52, 52-56]. These various documents were excluded from the evidence by the trial court despite the fact that they were offered to show that the order on which the indictment was based was illegal, arbitrary and capricious, *ultra vires*, without jurisdiction, contrary to law, without support of any substantial evidence, contrary to the undisputed evidence, and contrary to the due process clause of the Fifth Amendment [48-56]. Exception was duly taken to the action of the trial court in excluding this documentary evidence [56-57]. Petitioner requested the court to try the issue of his exemption from duty and want of authority of the draft board *de novo* [47-48, 57-58, 66-68]. He offered his own testimony, as well as that of another witness [57-58, 66-68]. By the *de novo* evidence thus offered he attempted to prove that he performed his work as a minister of religion without commercial gain; that he was an ordained minister of religion; that he stood in relation to congregations of Jehovah's witnesses as do ministers of the popular orthodox religious denominations [57-58, 66-68]. Moreover, he offered to show *de novo* that he regularly performed duties and ceremonies like those ordinarily performed by ministers of the orthodox religions, such as baptismal, memorial, burial, and other ceremonies usually performed only by ministers of religion [57-58, 66-68]. Additionally, petitioner offered to show that he was recognized by others of Jehovah's witnesses and by other persons not Jehovah's witnesses as

standing in the same relation to the Watchtower Bible and Tract Society and Jehovah's witnesses as do the regular and ordained ministers of orthodox religions [57-58, 66-68]. This evidence offered for the purpose of review *de novo* was excluded by the trial court, to which exception was duly taken and allowed [59, 69].

Petitioner duly urged his motion for dismissal of the indictment and for judgment of acquittal at the close of all the evidence [15-19, 77-78]. The grounds of the motion were that the undisputed evidence showed that the draft board order was void because the administrative agency had acted contrary to the Act, the Regulations and the due process clause of the Fifth Amendment in ordering petitioner to report for work of national importance. Additional grounds were urged [15-19]. The motion was denied with exception to petitioner [20].

Petitioner duly requested findings of fact and conclusions of law urging the court to find that the administrative order on which the indictment was based was illegal and void [78]. These requests were overruled, to which exceptions were allowed [78]. To the formal finding of guilty and written findings of fact made by the trial court the petitioner duly objected and excepted [22-23].

Specification of Errors

Petitioner relies upon every one of his assignments of error duly filed in the trial court as grounds for reversal of the judgment of conviction.

Points for Argument

ONE

A sensible construction of the Act and reasonable application of the Constitution require that petitioner be allowed to challenge the validity of the administrative action supporting the judgment of conviction in defense to the indictment.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the Civilian Public Service Camp and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to remain at camp and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing petitioner his defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. IF THE ACT IS CONSTRUED SO AS TO DENY A CHALLENGE OF THE VALIDITY OF THE ADMINISTRATIVE ACTION IN DEFENSE TO THE INDICTMENT BASED THEREON, PETITIONER WILL BE DENIED HIS RIGHT TO DUE PROCESS, JUDICIAL TRIAL, AND RIGHT OF TRIAL BY JURY, CONTRARY TO ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

II. IF THE ACT IS CONSTRUED SO AS TO DENY A CHALLENGE OF THE VALIDITY OF THE ADMINISTRATIVE ACTION IN DEFENSE TO THE INDICTMENT BASED THEREON, THE ACT WILL BE TRANSFORMED INTO A BILL OF PAINS AND PENALTIES CONTRARY TO ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION.

TWO

A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

THREE

It was reversible error for the trial court to refuse petitioner the right to challenge the legality of the action of the administrative agency by its denying petitioner his claim for exemption from training and service, which action was in violation of the Act, the regulations and the due process clause of the Fifth Amendment to the Constitution.

FOUR

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely petitioner's right to have the court pass upon the issue of the validity of his defense.

FIVE

This Court should hold that the District of South Dakota does not have venue of the prosecution in order to avoid a construction of the Act and regulations that deprives petitioner of his evidence and requires him to do an unreasonable act which puts him in a predicament and a trap contrary to the Fifth and Sixth Amendments of the Constitution.

ARGUMENT

ONE

A sensible construction of the Act and reasonable application of the Constitution require that petitioner be allowed to challenge the validity of the administrative action supporting the judgment of conviction in defense to the indictment.

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[2] This point has been exhaustively argued in Joint Brief for petitioners, *Smith* v. *United States* (No. 66 Oct. Term 1945) and *Estep* v. *United*

The Selective Training and Service Act of 1940 (§ 3a) in part provides: "* * * no man shall be inducted * * * until he is *acceptable* to the land or naval forces * * * and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added.) The administrative process beginning "with registration with the local board" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp". *Falbo* v. *United States*, 320 U. S. 549.

Although under the Regulations, as they existed in August 1944 when petitioner was ordered to report for work of national importance, there was no opportunity for a change of classification after the preinduction physical examination, yet it was necessary for petitioner to report at the camp and undergo the physical examination given by the camp in order to finalize and complete his acceptance at the camp under the Act and Regulations. The order commanded him to report at the camp. The Regulations required that he be examined at the camp. His examination enabled the camp to accept him and to complete the selective process.

Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination, which is a final-type physical examination for registrants classified as conscientious objectors (Reg. 651.1–651.8). If the conscientious objector is found physically fit, he is then assigned by the National Director of Selective Service to a designated civilian public service camp (Reg. 651.10, 652.1, 652.2) [30, 31]. Pursuant to such assignment, the local board issues the order to report for work of national

States (No. 292 Oct. Term 1945). Reference is here made to such argument as though incorporated at length herein. See that brief, pages 54-105. Additional points are urged by the Government in this case that require discussion in order to properly present petitioner's submission as to the law to be applied in this case. The differences between this case and the *Smith* and *Estep* cases are not sufficient to justify the application of a different rule.

importance. After the conscientious objector has been given a preinduction physical examination and has been assigned to a particular camp by the National Director, the local board then orders him to report at the board for transportation to the civilian public service camp to which he is assigned (Reg. 652.11). The Regulations provide that after arrival at the camp the registrant shall be examined to ascertain whether there has been a change in his physical or mental condition. But irrespective of the result of the physical examination he is accepted by the camp for work of national importance (Reg. 653.11). He cannot be rejected at the camp. If a change in his condition is found, he is hospitalized. The Regulations provide that the acceptance shall be noted after the physical examination. The camp director is required to place on the form a statement that the registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director (Reg. 653.11). This is the same procedure which was being practiced pursuant to the Regulations at the time that Falbo (petitioner in *Falbo* v. *United States*, 320 U. S. 549) was ordered to report for induction.[3]

However, the Government says that procedure differs now from that which prevailed at the time Falbo was ordered to report for induction, in that the registrant is not required to pass the physical examination given at the camp before he is accepted. (See Note 4 of the Memorandum in opposition to petition for writ of certiorari in this case; also compare therewith Note 6.)

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[3] Compare the statement of this court in *Falbo* v. *United States*, 320 U. S. 549: "The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp." See also Note 7, Opinion, *Falbo* v. *United States*, *supra*.

For all practical purposes, in determining whether or not the petitioner has exhausted his remedies, the procedure now is substantially the same as it was at the time Falbo was ordered to report for induction. Under the present Regulations acceptance is predetermined upon the final-type preinduction physical examination, but is not completed until the registrant is examined at the camp (Reg. 653.11). While now acceptance of a registrant is mandatory upon the physical examination at the camp, it was not thus at the time Falbo was ordered to report for work of national importance. While Falbo could be accepted at the camp, he could not, under the Regulations, be forthwith rejected. The Regulations required that the registrant who was not accepted be detained at the camp until the National Director of Selective Service had decided whether or not he would be "retained in the camp or hospitalized". Since acceptance under the Regulations as they exist now cannot be finalized until the registrant reports at the camp and undergoes the preinduction physical examination, under the doctrine of the *Falbo* decision Gibson could not exhaust his remedies until he had been accepted.

It should be observed that there is not a ceremony of induction at a civilian public service camp, which is separate from the selective process. In this respect the procedure for the processing of conscientious objectors into civilian public service camps is dissimilar to the procedure that prevails for registrants ordered to report for induction into the armed forces. *Billings* v. *Truesdell*, 321 U. S. 542, 553-554.

The procedure prescribed by the Regulations was pursued in petitioner's case. He underwent the preinduction physical examination and his fitness for work of national importance was determined [51, 52, 69]. The National Director of Selective Service assigned him to the civilian pub-

lic service camp at Hill City, South Dakota [30, 31]. On August 8 order issued commanding him to report on August 21, 1944 at his local board for transportation to a civilian public service camp to do work of national importance [30, 31, 69]. Petitioner reported and was transported to the camp. Although he was under jurisdiction of the camp to which he was assigned on his entraining for camp, he was not accepted until August 28, 1944, five days after his arrival on August 23, 1944 (Reg. 653.11) [33, 35, 70]. He was, however, enrolled on arrival at the camp August 23, 1944 [30, 33, 70]. He did not fully complete the administrative selective process until he completed the physical examination on August 28, 1944. After his acceptance he tendered the camp director a letter explaining that he reported solely to exhaust his administrative remedies and that he refused to do work of national importance because he had been illegally classified by the Selective Service System. He thereupon left the camp without performing any work or doing anything required of him at the camp [70-71].

When petitioner was ordered to report for work, and he appeared both at the local board and at the camp and refused to work after being examined, he was at that time in exactly the same position as was Billings in the *Billings* case (321 U. S. 542), after Billings had been examined and found acceptable and ordered to submit to induction.

Billings refused to submit to induction.

Gibson refused to submit to "induction."

The lower court's decision, reduced to its lowest factor, holds, on authority of the *Falbo* case, that the legality of the draft boards' proceedings and orders cannot be challenged in any manner in the courts in defense to an indictment. The *Billings* case is said to be wholly irrelevant to any issue presented by Gibson. Both of those conclusions are erroneous, and both grow out of an inade-

quate cognition of one key sentence appearing on page 558 of the *Billings* opinion, to wit:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

The difference between the construction placed on this sentence by the court below and the position of Gibson may be illustrated by interpolating the sentence and viewing it in parallel form:

"Moreover, it should be remembered that he who reports at the induction station [at the civilian public service camp for work of national importance and remains there] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."	"Moreover, it should be remembered that he who reports at the induction station [*to determine acceptance by physical examination* by the camp physician] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

If the interpolated sentence appearing at the left, above, represented a corrected statement of what the court said in the *Billings* case, then petitioner would readily concede that the court had verily closed the door of the judiciary to all registrants who had not remained at civilian public service camps, as the court below says it has done. But in truth and in fact this court has not held in the *Falbo* case that a registrant must first stay at a civilian public service camp before he can obtain judicial review of his rights under the Selective Training and Service Act. The interpolated sentence appearing at the right, above, truly expresses the holding of the *Billings* case and undeniably constitutes a clarification of the crucial question in the

Falbo case, which was simply this: "At what point in the selective process can it be said that a registrant has exhausted his administrative remedies so as to entitle him to judicial review of the legality of the selective process?" An examination of the words in the *Billings* opinion will show beyond question that the court has answered this question by drawing the line for the exhaustion of administrative remedies squarely between the separate and distinct steps of "*acceptance*" and actual *induction*. In the *Falbo* opinion the significant words are: "The connected series of steps into the national service which begins with registration does not end until the registrant is *accepted* by the army, navy, or civilian public service camp," *Falbo* v. *United States*, 320 U. S. 549, 553. See *Billings* v. *Truesdell*, 321 U. S. 542, 546, 553, 554, 555, 556, 558-559.

In considering the *Billings* decision (321 U. S. 542), it must be kept in mind that Billings was required to report at the induction station under the old regulations which provided that induction should immediately follow the acceptance on preinduction physical examination. In order to preserve Billings' right to follow the procedure outlined in the *Falbo* case (i. e., complete the "selective process" by being accepted upon the final or "preinduction" physical examination) and thereby put himself into position to obtain judicial review of his claim that the boards' treatment of his statutory and constitutional rights was illegal, it was necessary for the court to say, as it has, that his mere reporting to the induction station to submit to the preinduction physical examination could not of itself constitute induction, because such would defeat the very purpose of his submitting to this examination in that it would take him out of the jurisdiction of the civil courts and put him under the military tribunals thereby depriving him of the benefit of Senator Bone's amendment to Section 11 of

the Act which provides for the prosecutions of Selective Service violators in the civil and not military tribunals. As the court observed (in the *Billings* opinion), any other view would indeed make a "trap" out of the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies, in that it would require a registrant to exhaust his administrative remedies by being accepted on preinduction physical examination in order to obtain judicial review of his grievances in the civil courts, and then, by his very act of submitting to this examination, allow him to be taken out of civil jurisdiction altogether and put him under military jurisdiction. No other satisfactory explanation of those words has been advanced or can be advanced.

In the instant case, certainly the view taken by the Government, that a registrant must stay at a civilian public service camp before judicial review is possible, makes the court's words above quoted entirely meaningless; for what would be the purpose in "exhausting his administrative remedies" if, after having done so, he would still be denied the right to judicial review on the ground that he had not stayed at the civilian public service camp? If the Government's view is correct, then the registrant who stays away from the camp physical examination altogether would be in no worse position than he who reported to the induction station for the examination as outlined in the *Falbo* case, and this is precisely the dilemma the court sought to avoid creating in the *Billings* decision. If this be not the case, then words no longer have any meaning and no credence can be placed in any sober declaration in the English language.

That part of the *Falbo* decision to the effect that "a prompt and unhesitating obedience to orders issued in the selective service process is indispensable to the complete attainment of the object of national defense" does not

refer to that which the court below appears to suppose that it does. The court was expressly referring to the many intermediate steps that make up "the selective service process" and these words cannot be stretched into an inclusion of the separate and final step of staying at a civilian public service camp. How else besides in this manner can Justice Black's words in the *Falbo* opinion be explained: "Surely if Congress had intended to authorize interference with that [selective service process] by *intermediate* challenges of orders to report [for preinduction physical examination and similar interlocutory commands] it would have said so.

"* * * It is certain that Congress was not required to provide for judicial intervention before *final acceptance* of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process [which is, as above appears, final acceptance on physical examination]."

If there was ever any doubt as to whether the court, by its use of the phrase "final acceptance," was referring to acceptance upon final physical examination or acceptance by actual induction, that doubt was removed by the explanation made in the *Billings* opinion (p. 554) wherein it was clearly stated "*induction follows acceptance and is a separate process.*" The lower court's error in disposing of the *Falbo* case is that it has confused and confounded the word "acceptance" used in the *Falbo* opinion with "*induction.*" It is not disputed that Gibson had been finally "accepted" for service in the camp when he had completed his final physical examination by the civilian public service camp physician. This clearly distinguishes

his case from the "narrow question presented in the *Falbo* case.

There is no question that petitioner has exhausted his administrative remedies. This is conceded by the Government. It has said that "there can be no question of completing the administrative process, for the process had run its full course and petitioner was under the jurisdiction of the camp when he departed from the camp without authority. In this respect his position is no different from that of a registrant who has been inducted into the Army. Thus, the question the case presents is whether an inductee in the armed services or a conscientious objector who reports to a Civilian Public Service Camp may desert from the service or the camp, as the case may be, and thus lay a basis for challenging the propriety of his Selective Service classification." (See "Memorandum for the United States in opposition to the granting of petition for writ of certiorari," this case, pp. 7-8.)

Petitioner, insofar as exhaustion of administrative remedies is concerned, is therefore in exactly the same position as though he were before the court upon a petition for writ of *habeas corpus*. The only difference is the method in which the question is presented to the court. In a *habeas corpus* proceeding the question would be presented upon an affirmative move initiated by Gibson, who would request the court to pass upon the validity of the order to report. Here the civilian public service camp has invoked the order to report for work at the camp as ground for its jurisdiction, and by affirmative move requests the court to find that petitioner has defied that jurisdiction. The question for the court to decide is whether one who is illegally classified and ordered to do work of national importance must remain at the camp and then apply for a writ of *habeas corpus* as the only remedy.

Stated another way: The court must decide whether one who has exhausted his administrative remedies may be denied his right to challenge the validity of the order upon which an indictment is based, charging him with violating the Act for failure to remain at the camp and do work of national importance after having completed his administrative remedies.

The position of the Government is that by leaving the camp after having exhausted his administrative remedies petitioner defied the law and compelled the administrative authority to invoke the criminal sanctions clause of the Selective Training and Service Act against him. The Government says that petitioner "cannot test in that way the validity of the orders as applied to him." *Hirabayashi* v. *United States*, 320 U. S. 81, 109; *Giese* v. *United States* (App. D. C.) 143 F. 2d 633, 635, affirmed, *per curiam*, by an equally divided court, 323 U. S. 682. (See "Memorandum for the United States in opposition to the granting of petition for writ of certiorari," this case, pp. 8, 10.)

Moreover, the Government says that the course taken by Gibson is similar to that of a prisoner in a penal institution who has illegally escaped from custody and who, on being prosecuted for jail-breaking, is denied a defense to such prosecution on the ground that his sentence was irregular or voidable. The Government relies upon three cases.[4]

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[4] Memorandum in opposition to petition for writ of certiorari, p. 10: "Similarly, a prisoner in a penal institution cannot justify his escape because he is confined under an irregular or voidable sentence; despite the illegality of his imprisonment, he has committed a criminal offense. *Bayless* v. *United States*, 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748; *United States* v. *Jerome*, 130 F. 2d 514, 519, certiorari denied as to this point, 317 U. S. 606; *Aderhold* v. *Soileau*, 67 F. 2d 259 (C. C. A. 5). For other examples of situations in which, 'even in peacetime, the duty of the citizen to cooperate in effective law enforcement overrides his convenience,' see *Giese* v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed, *per curiam*, by an equally divided court, 323 U. S. 682." The district court decisions cited by the Government held,

The Government's assertion that the *Hirabayashi* decision is apposite here is spurious. The argument is wholly factitious. The question involved there was whether the curfew order was an unconstitutional delegation of authority and discriminatory. The validity of the exclusion order was not determined. The orders were made on a race or group basis. In that case there was no provision for individual demonstrative determinations. The law did not contemplate individual classifications. There was no provision for exhaustion of administrative remedies. There was nothing said in the Act or the order about administrative determinations respecting loyal citizens as compared with disloyal citizens of Japanese ancestry. It can be assumed that if the law or orders involved in the *Hirabayashi* case provided for exemption of loyal Japanese, or administrative determinations upon an individual basis as a condition precedent to invoking an exclusion order, then an inquiry thereof would have been permitted in a defense to an indictment of one charged with defying the exclusion order.

Even in the absence of an administrative determination on an individual basis, it must be assumed that if the Army did not have jurisdiction and authority over the particular individual or class of individuals, the person thus claiming want of authority could assert it in defense to an indictment based on his alleged defiance of the order. Suppose, in the *Hirabayashi* case that Hirabayashi were a Filipino or a Chinese who had been mistakenly included in the curfew

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under the 1917 Act, that deserters could not challenge the validity of draft board determinations and the validity of court-martial proceedings resulting from their desertion. (*Ex parte Romano*, 251 F. 762, 764 (D. Mass.); *Ex parte Tinkoff*, 254 F. 912 (D. Mass.); *Ex parte Kerekes*, 274 F. 870 (E. D. Mich.)) It should be observed that the United States Circuit Court of Appeals for the Eighth Circuit held, in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, that the invalidity of the administrative action could be challenged by a deserter who had been court-martialed in spite of his defiance of the orders of the administrative agency and of the armed forces.

order or the evacuation order. It must be conceded that in such circumstance Hirabayashi, if a Chinese or Filipino (neither of which nationals was within the scope of the order), could prove his nationality and show that the order was *ultra vires* and in excess of the jurisdiction asserted by the armed forces. That is precisely the situation presented here. It would be a violation of due process to compel one not subject to administrative action to comply with it in order to question the want of authority of the administrative agency.

In the *Hirabayashi* case the defendant actually defied the curfew order and the evacuation order. Nevertheless this Court considered his defense that the curfew order was void. In that case the Government did not contend that the defendant was not entitled to raise and the court was not entitled to consider the defenses urged because he had not complied with the order. If a defense as to the *constitutionality* of a particular order can be considered on the ground that it involves a determination of the constitutionality of the curfew order, then with equal force of reason the *courts* can also construe the order or statute and consider whether the particular order is applicable to the facts or is illegal because contrary to the statute authorizing it, in that the person affected is *exempt* or the administrative agency *did not have jurisdiction*, without requiring that he comply with the order. It seems plain that if an order of an administrative agency is legal it should not and can not be flouted; but that if an order of such agency is illegal and void, then as a matter of fact it cannot place any citizen under an obligation to do anything. If the citizen chooses to ignore an invalid, unlawful order, no one would contend that he would be prevented from setting up this fatal defect in any subsequent prosecution that might be instituted against him.

The analogy between the action of the petitioner and that of an escaped convict is wholly factitious and syllogistic. It is based upon an assumption of fact that does not exist. Like a house built upon a foundation of sand, it appears to be apposite. Yet when subjected to the turbulent waters of truth, the foundation melts away and the structure of the argument collapses. In the case of an escaped convict charged with jail-breaking, the prosecution is not based upon the judgment and commitment that placed him in custody. The commitment is wholly collateral. The jail-breaking is incidental to the original judgment. Prosecution for jail-breaking is based upon a statute specifically prohibiting jail-breaking. Prosecution in the instant case is directly based upon alleged defiance of an administrative order which is directly challenged in the proceedings.

In the case at bar the administrative authority has been directly invoked by the civilian public service camp in delinquency proceedings through indictment charging petitioner with a violation of the administrative order. Petitioner says that the administrative order is void for want of jurisdiction of the camp and of an administrative agency. He says that the order is *ultra vires* and that it is wholly void. It is more than voidable. When the supposed analogy claimed by the Government between the act of the petitioner and that of an escaped convict is subjected to this test, it disappears as an illusion.

In cases involving prosecutions for prison breaks the prisoner is confined because of his violation of the law. In the case at bar the petitioner was confined at a civilian public service camp because he had to go there to exhaust his administrative remedies, on account of the violation of the law by the administrative agency. Since the board had no jurisdiction because he was exempt as a minister of religion from all training and service under the Act,

the camp had no jurisdiction. This can be shown in actions instituted under Section 11 of the Act to enforce the orders of the administrative agency.

The proceedings in the case at bar are more analogous to contempt proceedings based upon defiance of the order of court than the Government's "escaped convict" simile. The decision styled *In re Burrus* (136 U. S. 586) held that one who defied the order of a court could challenge the validity of the order on the grounds of want of authority, *ultra vires*, or excess of jurisdiction to make the order. See also *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

Under the Selective Service Act of 1917 it was held that judicial review was not waived by reason of defiance of the administrative agency and violation of the orders of the armed forces by desertion. (*Ver Mehren* v. *Sirmyer*, 36 F. 2d 876) By force of the same reasoning, defiance of the administrative order and the choosing to depart ("desertion") from a civilian public service camp after reporting to such camp to exhaust administrative remedies, by one, like petitioner, who claims to be exempt as a minister of religion under Section 5 (d) of the Act, would not constitute a waiver of his challenge of the validity of the administrative action classifying him as liable for training and service. (See Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, pages 69-72.)

It cannot be argued that petitioner went too far by submitting to the jurisdiction of the civilian public service camp. This Court in the *Falbo* case held that a conscientious objector had to report to the civilian public service camp in order to exhaust his administrative remedies. (320 U. S. 549, 553) Under the Act and Regulations the acceptability of petitioner could not be finally accomplished until he had undergone the physical examination at camp.

He could not be examined by the camp physician until petitioner had reported at the camp. If, in order to avoid the assumption of jurisdiction by the civilian public service camp, he stayed away entirely by not reporting, his acceptance would never have been finalized.

It would be unreasonable and unjust to say that one classified as a conscientious objector would have to report at a camp in order to exhaust his remedies and then to say that if he did report and exhaust his remedies he would waive his right to challenge the validity of the order when he chose to depart from the camp after completing his administrative remedies. The fact that the physical examination would not accomplish his discharge from the camp does not change the proposition that he had to report in order to consummate his acceptance at the camp.

There was no "induction" ceremony. Neither the Act nor the Regulations provide for the drawing of a line at the camp as to just where jurisdiction began and ended. The Government asserts that the jurisdiction was assumed when the petitioner entrained for the civilian public service camp. (Reg. 652.13) [5] If this argument is true, then a registrant who entrains for a civilian public service camp but who changes his mind en route and does not complete the trip could be prosecuted for desertion under the Act and Regulations.

As in the case of registrants who are ordered to report for induction, the Act and Regulations are wholly silent concerning *habeas corpus* as the exclusive remedy for one ordered to report for work of national importance at a civilian public service camp. However, the Act and Regulations are explicit that the United States district courts shall have jurisdiction to enforce the Act and Regulations as to selectees and trainees at a civilian public service camp.

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[5] See "Memorandum for the United States in opposition", etc., p. 5.

Since the Act provides that its enforcement as to civilian public service camps shall be in the federal district courts, it seems only reasonable that if the civilian public service camps invoke the jurisdiction of one of such courts to enforce an administrative order made the basis of their jurisdiction, such order shall be subject to attack in the district court on the ground that the order was made in excess of the jurisdiction of the administrative agency.

It is utterly ridiculous to assume that Congress contemplated that a minister, a State Governor, or a judge, exempt under the Act from training and service, should be required to report for work of national importance, and remain at a civilian public service camp for months while the invalidity of the administrative action was being determined in a *habeas corpus* proceeding. It is equally fatuous to presume that Congress intended that *habeas corpus* to establish the invalidity of an administrative order was the only remedy.

It is inconsistent to say that Congress exempted ministers and judges and other specified public servants from duty and at the same time to say that Congress intended that such registrants would have to abandon their assigned duties in order to establish the invalidity of the administrative determination respecting their status under the Act. Congress said that exempted ministers belonged with their congregations. It is figmentary to argue that Congress intended that a minister would have to abandon his congregation and travel all the way across the country to report to and remain at some isolated civilian public service camp in the wilderness pending a final determination of a petition for writ of *habeas corpus* in the federal appellate courts if the district court should err.

The only reason that an exempt registrant is required to report for "induction" at a civilian public service camp

is to exhaust his administrative remedies. It is unreasonable to suppose that Congress intended that an exempt registrant should be required to perform work of national importance at such camp as a condition precedent to establishing the invalidity of the administrative determination. If the invalidity can be established upon a petition for writ of *habeas corpus* and it is denied in a trial of an indictment brought under Section 311 of the Act because of the contempt and defiance of the administrative agency, then there is a denial of judicial trial and the Act has been converted into a bill of pains and penalties, contrary to the "bill of attainder" clause of Article I of the Constitution.

TWO

A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

This point has been fully argued, except for some additions and a new decision that has been rendered since October 1945, under point Four of the Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term, 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945. See pages 105-131. That argument is sufficient for the argument under this point. Reference is here made to such argument in that brief as though incorporated at length herein. Additional comment germain to this point will be found under the following point herein.

THREE

It was reversible error for the trial court to refuse petitioner the right to challenge the legality of the action of the administrative agency by its denying petitioner his claim for exemption from training and service, which action was in violation of the Act, the regulations and the due process clause of the Fifth Amendment to the Constitution.

This point has been fully argued, except for some additions and a new decision that has been rendered since October 1945, under point FIVE of the Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945. See pages 131-190. That argument is sufficient for the argument under this point. Reference is here made to such argument in that brief as though incorporated at length herein.

On November 6, 1945, the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *United States ex rel. Hull* v. *Stalter*, held that one of Jehovah's witnesses had been illegally classified and ordered him discharged from custody of the civilian public service camp. There that court held that the undisputed evidence showed that Hull was a full-time pioneer missionary evangelist. Although he was engaged in secular work at the time he filed his questionnaire, he later abandoned secular work and undertook the full-time pioneer missionary-evangelist work. He was engaged in that work at the time he was finally classified by the local board. Upon facts almost identical to the facts in the case at bar, the Circuit Court of Appeals in that case held that the action of the administrative agency flew in the teeth of all the evidence and was a violation of the due process clause of the Fifth Amendment. Reference is here made to such decision.

Although that decision was rendered in a case where review of the administrative determination was sought by a petition for writ of *habeas corpus*, nevertheless it should be apropos here. It should be observed that Hull, petitioner in that case, had been indicted, tried and convicted by the Federal District Court in Ohio for refusing to report to a civilian public service camp pursuant to order of the local board and in violation of Section 11 of the Act. The district court suspended imposing of sentence on condition that Hull would report to the camp and then apply for a writ of *habeas corpus*, following the decisions of several circuit courts of appeals to the effect that *habeas corpus* was the only remedy. Hull reported to the camp, according to the condition imposed by the court in suspending imposition of sentence. He applied for a writ of *habeas corpus* before the Federal District Court in Indiana. The writ was granted. He was discharged. *Hull* v. *Stalter*, 61 F. Supp. 732.

The action of the court in suspending sentence in the *Hull* case on condition that he report to the camp does not prove that *habeas corpus* is the only remedy. It merely establishes the fact that Hull did not complete the selective process.

In this case, the petitioner, at the time of his final classification in May 1943, had been engaged full-time in the pioneer missionary-evangelist work under direction of the Watchtower Bible and Tract Society for more than two years, except for such time as he obtained temporary leave in order to refinance himself by "making tents" as did the apostle Paul.—Acts 18:3; 20:33-35.

The activity of calling from house to house, as one of Jehovah's witnesses, to teach the people about God's kingdom and to help them obtain an education in the Bible, is not secular work nor is it church work done by a lay

worker. The Government and some judges have argued that the activity of Jehovah's witnesses is nothing more than the work of a lay worker of an orthodox church. This assertion and argument beg the question, are factitious and syllogistic, because assuming a fact that does not exist and applying an orthodox standard to a primitive dissentient and unorthodox organization that cannot be gauged by the yardstick of the popular clergy. Jehovah's witnesses perform their missionary evangelistic ministerial work as primitive Christian ministers. This they do from house to house and publicly. The fact that some lay workers who are not ordained ministers of the orthodox religious denominations do charitable work for such orthodox denominations in a similar manner does not prove that Jehovah's witnesses are lay workers rather than ordained ministers. The fact remains that Jehovah's witnesses are actually ordained according to the ceremonies and regulations of the Watchtower Bible and Tract Society and Jehovah's witnesses, and they are recognized as duly authorized and duly ordained ministers of the Watchtower Bible and Tract Society and Jehovah's witnesses. This cannot be set aside by the courts because the orthodox denominations employ a different method. (See argument made under point Five in Joint Brief for petitions, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, pages 173-190.)

Moreover, the contention of the Government and of some judges, that the position of Jehovah's witnesses and others similarly situated is no different than that of those engaged in work done by a lay worker, is inconsistent with the views and opinions of the Selective Service System, authoritatively expressed on the subject. (See Appendix to Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, pages 28a-57a, 71a-73a.)

FOUR

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely petitioner's right to have the court pass upon the issue of the validity of his defense.

This point has been exhaustively argued in the Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, at pages 190-194, to which reference is here made. That argument is incorporated here as though copied at length herein.

FIVE

This court should hold that the District of South Dakota does not have venue of the prosecution in order to avoid a construction of the Act and regulations that deprives petitioner of his evidence and requires him to do an unreasonable act which puts him in a predicament and a trap contrary to the Fifth and Sixth Amendments to the Constitution.[6]

Before the case proceeded to trial in the court below the petitioner, by filing a motion to quash, challenged the authority of the Government to prosecute him in the District of South Dakota. He contended that, having an intention to leave after he had been examined at the camp, the only reason for his reporting at the camp as directed in the order was to exhaust his administrative remedies by undergoing a physical examination at the camp, thereby eliminating all doubt as to whether he had completed the selective process. This step was suggested by the Supreme Court in the *Falbo* decision. (See Note 7.)

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[6] Substantially the same question is presented to this court in *United States* v. *Anderson*, No. 447 Oct. Term 1945; see 60 F. Supp. 648 (DC-W. Wash.).

The controversy between the petitioner and his local board originated and was terminated within the administrative agency in the State of Arkansas. The draft board files showing jurisdiction over the defendant were located in Arkansas. These records, pursuant to stipulation of the parties, were produced from Arkansas without bringing the clerk of the local board to prove their content. All of the members of the boards that considered defendant-petitioner's rights under the Act reside in Arkansas. Also the State Director of Arkansas. All these witnesses were hundreds of miles from Hill City, South Dakota.

South Dakota was not the district where the controversy arose or where the order on which the indictment is based was issued. Therefore the alleged crime was not committed in South Dakota, because the order, the source of which was in Arkansas, that petitioner is alleged to have violated, commanded him not only to report. The Arkansas order also required petitioner "to remain in the camp and perform" his duties (Government's Exhibit 3). See also *Billings* v. *Truesdell*, 321 U. S. 542, 557-558. The order was issued by a local board in Illinois acting as an agent for the local board in Arkansas (Regs. Sec. 633.12).

Section 311, Title 50, United States Code (Selective Training and Service Act of 1940), providing for prosecutions in the district courts and for criminal sanctions, does not provide for venue. In absence of a specific provision for trial at a place other than where the violation occurred it must be assumed that Congress intended that a registrant should be tried in the district where the controversy arose, where the boards were situated, and where witnesses would be equally available to all parties.

Petitioner was forced to go to trial at a place remote from his home, remote from the board that classified him and that authorized him to be assigned to do work of na-

tional importance in a civilian public service camp, and thus he was far removed from his witnesses. This is especially harsh where a person reports to the camp for the purpose of exhausting his remedies. Petitioner did not go to the camp for the purpose of performing work. Having gone there to exhaust his remedies, he finds himself now in a trap. Although he has exhausted his remedies he cannot have witnesses to prove the illegality of the action of the administrative agency. Indeed, petitioner, being an indigent person, made application for subpoena for witnesses from Arkansas, including all the members of the boards and the officers in the office of the State Director of Arkansas, for the purpose of establishing that the administrative agency violated the Act and the Regulations in classifying petitioner. (See the application for the subpoena which appears in the record at pages 4-7.) The application was overruled [7-8].

The action of the court in overruling the motion to quash on this ground was contrary to the holding of this court in *United States* v. *Johnson*, 323 U. S. 273. There the defendant was indicted under the Federal Denture Act in the district of Maryland for putting articles in the mails at Chicago for delivery in Delaware. The court held that, in absence of an express provision for trial in a distgict other than where the articles were deposited in the mails, the statute must be construed so as to allow trial at a place "more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes." The court also said: "If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

* * * While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise, see R. S. sec. 878, 28 U. S. C. sec. 656, of marshalling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice. Inasmuch as the statute permits and does not forbid this construction the judgment should be affirmed."

The *corpus delicti* of a violation of this Act involves the duty of the registrant to perform service (Sec. 311). If he has no duty he is not guilty. If he has exhausted his remedies he can show in defense to an indictment that he has no duty. If he can show in defense to the indictment that he has no duty it is necessary to produce the draft board members and others to show a violation of the Act by them and that he has no duty. If the validity of the draft board proceedings can be inquired into in defense to the indictment, then of necessity the place of trial should be at such place where the draft board is located.

Indeed the situation here is closely analogous to the condition brought under review of the court in the *Johnson* case, *supra* (323 U. S. 273). There the *corpus delicti* involved not only the mailing of the article in Chicago, its moving through other places in interstate commerce, and the ultimate delivery in Delaware. In this case the act which set in motion the events resulting in the indictment occurred before the boards in Arkansas. The process, beginning in Arkansas, traveled through many states and ultimately the defendant-petitioner was brought to rest in South Dakota. His steps took a course similar to the course taken by the package mailed in the *Johnson* case.

In that case it was more convenient to try the defendant in Delaware where the witness for the Government who had received the package was available. In the *Johnson* case it was a manifest hardship to the defendant to be put to trial so far from the place where all his witnesses were. In this case it was a manifestly more convenient move for the Government to try Gibson in South Dakota. Also in this case it was a manifest hardship to put Gibson to trial in South Dakota where it was impossible for him to have compulsory process over the members of the draft boards. In the *Johnson* case the statute was silent as to place of prosecution. In this case the statute is silent as to place of prosecution.

The mere act of leaving the camp in South Dakota did not constitute the entire *corpus delicti*. It was no more the entire body of the crime than was the delivery of the package in Delaware in the *Johnson* case. The leaving of the camp after exhausting his remedies was merely the end of a chain of events that was set in motion in Arkansas, as was the receiving of the parcel in Delaware in the *Johnson* case the end of the chain of events set in motion at Chicago. For the purposes of venue, the crime, if any, in this case was no more committed in South Dakota than was the crime, if any, in the *Johnson* case committed in the state of Delaware. It is submitted that the *Johnson* case is squarely in point and, upon the basis of it, the trial court should have sustained the motion to quash and ordered the indictment dismissed because the prosecution was instituted in the wrong district.

In event the court reaches the conclusion that this case is prosecutable in the district of South Dakota, then petitioner says that the court should hold that the construction placed upon the statute so as to place him in this trap of not being able to produce his witnesses is unconstitutional.

The construction placed upon the Act and Regulations in the *Falbo* case requiring an exempt registrant classified as a conscientious objector to report hundreds of miles away at a camp for the purpose of exhausting his administrative remedies and which then permits him to be prosecuted in another district and state far removed from his home and his local board is unreasonable, arbitrary, and deprives the accused of his rights and liberty contrary to the due process clause of the Fifth Amendment. It is highly unjust and inconvenient to make a dragnet for penalties out of a statute of this sort. However, the construction has actually done just that. *United States* v. *Shackford*, 5 Mason 445, 450; *Harrison* v. *Vose*, 50 U. S. 372, 378. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequences. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned" (*United States* v. *Kirby*, 7 Wall. 482, 486-487). A provision of the law "should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled." *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351-352.

Conclusion

The judgments of the courts below should be reversed and the trial court ordered to dismiss the indictment or, in the alternative, a new trial should be ordered.

Respectfully,

TAZE HAMRICK GIBSON,
By HAYDEN C. COVINGTON,
His Counsel.

December 1945.

(1881)

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 221 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner's
REPLY BRIEF

HAYDEN C. COVINGTON
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 221

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Petitioner's
REPLY BRIEF

MAY IT PLEASE THE COURT:

In its brief the Government has argued that *habeas corpus* subsequent to the performance of work of national importance is the only remedy for a minister of religion who has been illegally ordered to report to a conscientious objectors' camp. This point being fully answered in Joint Brief for Petitioners in *Smith* v. *United States,* No. 66 October Term 1945, and *Estep* v. *United States,* No. 292 October Term 1945, further argument here is unnecessary. See pages 54-105 of that brief.

The Government argues that Gibson went too far. It is said: "Whatever may be the situation of a registrant who upon the final determination of his acceptability refuses to proceed further . . . petitioner is not within this category. By becoming a member of the camp he acquired new rights and duties and by deserting from the camp he purposely failed to perform those duties. In pursuing the course of conduct which he undertook petitioner assumed the risk that the legal advice upon which he relied was correct."*

The legal advice upon which the petitioner relied was given by this court in its decisions in *Falbo* v. *United States,* 320 U. S. 549, and *Billings* v. *United States,* 321 U. S. 542, 554-555, 557. In the *Falbo* decision the court said that "the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp."

Since this court held that it was necessary for Falbo to report for induction in order to exhaust his remedies, and since the Regulations of the Selective Service System governing conduct of registrants classified as conscientious objectors were substantially the same when Gibson was ordered to report, it was necessary for Gibson to report at the conscientious objectors' camp in order to *finalize* his *acceptance* so as to complete the selective process. The preinduction physical examination does not complete the selective process. Falbo had a final-type physical examination prescribed by the Regulations. (Reg. 651.1-651.8; see Government's brief, *Falbo* v. *United States,* No. 73 October Term 1943, pages 105-108.) The final-type physical examination then prescribed for conscientious objectors was the same as the preinduction physical examination now given to all registrants. (See Second Petition for Rehearing, *Falbo* v. *United States,* No. 73 October Term 1943, pages 10-27,

* See Government's brief, note 10, where it is said that petitioner would have been in position to decline to go further "after he had passed his preinduction physical examination and received a Certificate of Fitness from his local board."

overruled 322 U. S. 770; see, also, *Grieme* v. *United States*, No. 883 October Term 1943, Petition for Writ of Certiorari, pages 9-13, certiorari denied, 322 U. S. 744.)

In its brief in this case the Government says that the procedure upon reception of a conscientious objector at a civilian public service camp "differs from that which prevailed at the time of *Falbo's* case. At that time it was possible for a registrant to be rejected upon examination at the camp (see 320 U. S. at 583) and the procedure thus paralleled the procedure for inducting men into the armed forces." This statement of the Government, together with the statement of this court in the *Falbo* decision referred to by the Government in the foregoing quotation, shows that both this court and the Government misapprehended and misconceived the Regulations governing reception of conscientious objectors at civilian public service camps. (See Second Petition for Rehearing, *Falbo* v. *United States*, No. 73 October Term 1943, pages 24-28.)

Even though it was possible for one to be discharged from a civilian public service camp because of physical disability after reporting at such camp, under the Regulations as existing at the time of the *Falbo* case (which now is impossible under amended Regulation 653.11 (c)), it was then and still is now necessary for a conscientious objector to report at the civilian public service camp to finalize his acceptance. (Reg. 653.11 (a), (b) and (c)) Although the Selective Service policy with reference to reception of conscientious objectors at civilian public service camps is discussed in the letter from the National Headquarters of Selective Service System to the Attorney General (Appendix C to Government brief in this case), which fails to show the court specifically at what point the Selective Service System considered the *acceptance* of the assignee to be finalized, the more recent amendments to Regulations 653.11 (c) clearly remove all vagueness and ambiquity from the administrative policy. The latest amendment to this Regulation provides that "the acceptance of the assignee

. . . shall occur when the camp director completes and signs the Order to Report for Work of National Importance." The filling out of this form does not occur until after the examination by the camp physician. Gibson waited until the examination had been given and the forms filled out before he departed from the camp. The substance of the regulations concerning reception of assignees at civilian public service camps has been the same since the first regulations were promulgated. There have been no material changes in Regulation 653.11. Accordingly, the above quoted authoritative administrative statement as to when acceptance at a civilian public service camp occurs must be taken as the law, applicable at all times under Regulation 653.11.

The Government labors under the misapprehension that since it is not now possible for a conscientious objector to be discharged or rejected upon reporting at a civilian public service camp, acceptance is completed upon the taking of the preinduction physical examination. It is not the possibility of rejection or discharge that completes the selective process. It is the final act of acceptance at the camp which completes the selective process.

The Government through sylogism reaches the conclusion that the petitioner is in the same posture as Smith and Estep would have been had they "submitted to induction and then deserted from the armed forces." (Government's brief) This analogy is specious and not apposite, for several reasons. In the first place, there is no induction ceremony or other formality that an assignee is required to undergo before attaining the status of a full-fledged campee. No line is drawn to warn the assignee that he is about to assume a status imposing additional obligations. In the case of a man ordered to report for induction into the armed forces appropriate ceremony is prescribed, affording him opportunity to choose between acceptance of military service or prosecution in the civil court. A campee is and always remains a civilian. He has

no opportunity to choose between the status of an assignee and defending his cause in the civil court. The law requires him to report at the camp in order to do work of national importance under civilian direction. (Reg. 652.11, 653.12) In event he has been illegally classified, he must still report in order to complete the selective process. (*Falbo* v. *United States*, 320 U.S. 549; *Billings* v. *Truesdell*, 321 U.S. 542) Of course, if a minister who had been illegally classified as a conscientious objector had an opportunity to choose between voluntarily performing work of national importance and refusing to perform such work after having completed the selective process, and he voluntarily chose to do work of national importance, then he could be held to have waived his right to challenge the legality of the administrative action. Concededly, since there is no opportunity to make the choice, it cannot be said that a minister who is attempting to exhaust his administrative remedies by completing the selective process has waived his right to challenge the legality of the administrative action.

The Government contends that it is the unqualified duty of each registrant classified as a conscientious objector to report at a civilian public service camp and there remain until administratively released or judicially released by *habeas corpus*. The respondent makes no distinction between registrants liable for the performance of work of national importance and those expressly exempted by Congress from training and service. The Government's argument may be applicable to a person liable for training and service. However, the Government's theory is not applicable to any who are specifically exempted from training and service. It is within the discretion of the Selective Service Director to defer certain persons liable for training and service, or allocate them to perform service elsewhere than in the armed forces. Such persons do not have the same rights as registrants expressly exempted by Congress from training and service. These two types of registrants should not be confused one with the other. It is not

a question of the propriety of the classification made within the authority of the classifying agency if an exempt registrant is ordered to report for work of national importance. In such a situation it is rather a question of want of jurisdiction, lack of authority, or *ultra vires* action, on the part of the administrative agency. In such an instance of illegal action, the order is not voidable but is wholly and inherently void.

Even though an exempt registrant should report to a civilian public service camp for the purpose of exhausting his remedies and thereby subject himself to the custody of the director of the camp, this does not confer jurisdiction upon the camp director. The order to report for induction being void for want of jurisdiction on the part of the board, *a fortiori*, the alleged jurisdiction of the camp director is likewise void for the same reason.

The order of an executive agency commanding a person exempt from military duty to submit to the performance of duty is void for want of jurisdiction. It follows that the orders of a draft board and of a camp director based upon the decision that an exempt person is liable for training and service is "clearly without jurisdiction, cannot protect the officer who executes" them. *Wise* v. *Withers*, 3 Cranch 331, 336.

The pivotal fact to be determined is whether one is exempt by Congress from training and service under the Act. "In relation to these basic facts . . . the question is not the ordinary one as to the propriety of provisions for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions." *Crowell* v. *Benson*, 285 U. S. 22.

The Government has made an analogy of the act of the petitioner in leaving the civilian public service camp with that of a convict escaping from prison contrary to federal statute or the unlawful resistance of a culprit to the

execution of a warrant for arrest. This analogy has been appropriately anticipated and answered in petitioner's main brief. A few points deserve comment, however.

The rule of the cases alluded to by the Government is confined to instances where the process defied is issued by a tribunal having jurisdiction. Inasmuch as the rule advocated by the Government is confined to process merely voidable rather than void, the analogy does not apply to the conduct of a minister exempt by act of Congress in leaving a civilian public service camp that does not have jurisdiction over him because of the *ultra vires* action of his local board. In this instance the order given the petitioner by the draft boards was void rather than voidable, for want of jurisdiction of the local board. Indeed, the draft boards and all persons acting under their direction in assuming jurisdiction over petitioner are liable to petitioner for damages in a tort action at law.* Therefore the cases relied upon by the Government in instances where there has been defiance of a warrant for arrest or escape from a penal institution are wholly inapposite here. Moreover, the line of district court decisions in which it has been held that a deserter could not challenge his classification under the 1917 Act because of his defiance of the authority and taking the law into his own hands, did not involve situations where the registrant was entirely exempt from all training and service under the Act. Furthermore, these decisions are materially weakened by the decisions of the Circuit Court of Appeals in *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, with which they conflict.

Inasmuch as it is necessary to exhaust administrative remedies by reporting at the civilian public service camp

* *Miller* v. *Horton*, 152 Mass. 540; *Pearson* v. *Zehr*, 138 Ill. 48; *Manning* v. *Ketcham* (CCA-6) 58 F. 2d 948; *Wise* v. *Withers*, 3 Cranch 331, 336. See, also, Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927, Harvard University Press, Cambridge, Mass.) pages 44-45, 307-308.

where there is no line drawn or ceremony, it is indeed unfair to deny a minister of religion, who has attempted to protect his rights under the act, his right to challenge the legality of the administrative action because he went *'too far'* when he reported in good faith to complete the selective process as suggested by this court in the *Falbo* and *Billings* decisions. The Government says that the petitioner assumed the risk of following such suggested course of action. The Government would have this court treat petitioner much worse than a man treats his dog. The dog, unaware of the law made for him in the chambers of his master's mind, does not know he has made a mistake until he is whipped by his master. But even a dog is not punished when he does what he is told to do.* Here, however, the Government would have the court punish the petitioner for doing what this court suggested in the *Falbo* and *Billings* decisions. Petitioner respectfully asks, Is not the Government asking the court to go *'too far'?* Will compliance with the Government's request be "equal justice under law"?

* "Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk: common law by its very essence. It is the Judges (as we have seen) that make the common law:— Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way Judges make law for you and me. They won't tell a man before hand what it is he *should not do*, they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."—TRUTH in Jeremy Bentham's *Truth versus Ashhurst* (London, December 17, 1792; printed in 1823 by T. Moses, 30, Wilderness Row, London, England.)

Conclusion

For reasons stated above and on account of the arguments appearing in petitioner's main brief, the relief prayed for in the petition for writ of certiorari should be granted.

TAZE HAMRICK GIBSON, *Petitioner*

By HAYDEN C. COVINGTON
His counsel

January 1, 1946

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 221 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX
to Brief for Petitioner

HAYDEN C. COVINGTON
Counsel for Petitioner

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APPENDIX

[Immaterial portions of documents reproduced herein are omitted. Handwritten or typewritten answers on reproduced printed forms appear herein in *italics.*]

Government's Exhibit 1

SELECTIVE SERVICE QUESTIONNAIRE

[D. S. S. Form 40]

Order No. *12,064*
(Stamp of Local Board)
Local Board A
Union County
El Dorado, Ark.

Date of mailing *Oct 5-1942*
Name: *Taze Hamrick Gibson*
Address: *Box 775*
El Dorado Union (County) *Arkansas*

NOTICE TO REGISTRANT

You are required by the Selective Service Regulations to fill out this Questionnaire truthfully and to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

THIS QUESTIONNAIRE MUST BE RETURNED ON OR BEFORE *Oct 15 1942*

E H Mellor Member of Local Board

[Stamp of Local Board]
Local Board "A"
Union County
OCT 12 1942
406 First Natl. Bank Bldg.
El Dorado, Arkansas

STATEMENTS OF THE REGISTRANT

Series I.—IDENTIFICATION

1. My name is *Taze Hamrick Gibson*

* * *

3. My residence now is *113 Lee Ave., El Dorado, Ark. Box 775 El Dorado Union* (County) *Arkansas*

* * *

5. My Social Security number is *427-18-6296*
6. I was *20* years of age on my last birthday.

Series II.—PHYSICAL CONDITION

1. To the best of my knowledge, I *have no* physical or mental defects or diseases.
2. I *am not* an inmate of an institution.

Series III.—EDUCATION

1. I have completed *8* years of elementary school and *1* year of high school

2. I have had the following schooling other than elementary and high school *Divinity School* (Course of Study) *Ministry* (Length of Time Attended) *Have attended a full two years and still attend*
3. I *can* read and write the English language.

Series IV.—PRESENT OCCUPATION OR ACTIVITY

* * *

2. (a) The job I am now working at is: *Minister of Religion*

(b) I do the following kind of work in my present job: *Preaching the Kingdom of God for which Jesus taught his followers to pray (Matthew 6: 10)*

(c) I have had *4* years experience in this kind of work.

(d) My average *have none* earnings in my present job are $ *receive contributions*

(e) In my present job I am [x] an independent worker, working on my own account, not hired by anyone, and not hiring any help.

* * *

(h) Other business or work in which I am now engaged is *None*

* * *

Series VI.—OCCUPATIONAL EXPERIENCE, QUALIFICATIONS AND PREFERENCES

1. I have also worked at the following occupations other than my present job, during the past 5 years: *Farm laborer Farming from 1934 to 1940*

2. My usual occupation, or the occupation for which I am best fitted, is *Ministry work*

3. I *am not* licensed in a trade or profession.

4. I have worked in the following State or States during the past 2 years *Mississippi and Arkansas*

5. I prefer the following kind of work *Ministry work*. I *would not* consider accepting a job which would require me to move from my present home.

Series VII.—FAMILY STATUS AND DEPENDENTS

1. I am [x] single.

* * *

Series VIII.—MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

1. (a) I *am* a minister of religion.

(b) I *do* customarily serve as a minister.

(c) I have been a minister of *Jehovah's witnesses* since *June-1938*

I *have* been formally ordained. If so, my ordination was performed on *Sept. 9, 1938* by *Bro. Miller* at *Birmingham, Alabama*

2. (a) I *am* a student preparing for the ministry in a theological or divinity school.

(b) I am attending the *Watchtower Bible and Tract Society*, which was established *before* September 16, 1939, and is located at *117 Adams Street, Brooklyn, New York*

Series IX.—CITIZENSHIP

1. I was born at *Meridian Mississippi U. S.*
2. I was born on *September 14, 1922*
3. My race is [*x*] White
4. I *am* a citizen of the United States

* * *

Series X.—CONSCIENTIOUS OBJECTION TO WAR

By reason of religious training and belief I am conscientiously opposed to war in any form and for this reason request that the local board furnish me with a Special Form for Conscientious Objector (Form 47) which I am to complete and return to the local board.

Taze H. Gibson (Signature)

Series XI.—COURT RECORD

1. I *have not* been convicted of a crime, other than minor traffic violations.

* * *

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class *4-D Kindly see attached information also printed matter in the form of books, booklets, magazines, etc.*

REGISTRANT'S AFFIDAVIT

State of ....., County of ..... ss:

I, *Taze Hamrick Gibson*, do solemnly swear that I am the registrant named and described in the foregoing statements in this Questionnaire; that I have read the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information,

and belief. The statements made by me in the foregoing *are* in my own handwriting.

Taze H. Gibson

Subscribed and sworn to before me this *12* day of *Oct* 1942.

6-1-43 *J G Thomas Notary*

* * *

MINUTE OF ACTION BY LOCAL BOARD

The local board classifies the registrant in Class *1*, Subdivision *A*, by the following vote: Yes *3*, No *0*

Nov 6 1942 *A. P. Reynolds* Member

APPEAL TO BOARD OF APPEAL

I hereby appeal to the board of appeal from the determination of the local board.

Nov 12 1942 *Taze Hamrick Gibson*

MINUTE OF ACTION BY BOARD OF APPEAL

No. *2*, STATE OF *Arkansas*

The board of appeal classifies the registrant in Class *IV*, Subdivision *E*, by the following vote: Yes *4* No *0*

May 3, 1943 *S. C. Vinsonhaler* Member

MINUTES OF OTHER ACTIONS

12/10/42 District Appeal Board determined by a vote of 4 to none that registrant should not be classified in Class I-C, Class IV-F, Class IV-D, Class IV-C, Class IV-B, Class IV-A, Class III-A, Class II-B, Class II-A, or Class I-H.

S. C. Vinsonhaler Member

May 8 1943 On decision of District Appeal Board No. 2, classification changed to 4-E, by 3 votes ayes, noes 0. DSS Form 57 mailed to registrant.

E. H. Mellor

July 31, 1944 DSS 218 mailed

Government's Exhibit 2

ASSIGNMENT TO WORK OF NATIONAL IMPORTANCE
[DSS Form 49]

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
Washington, D. C.

May 23, 1944

To the STATE DIRECTOR OF *Illinois*

Registrant
Taze Hamrick Gibson
Box 82
Virden, Illinois

RECEIVED
MAY 25 1944
FIELD & SPECIAL
S.S.S. ILLINOIS

Order No. *12,064 of Local Board*
who has been classified in Class IV-E, as being conscientiously opposed to both combatant and noncombatant military service is hereby assigned to work of national importance and by order of said Local Board per D. S. S. Form 50 will be delivered to:

Camp Director
Civilian Public Service Camp No. 57
Hill City, Pennington County, South Dakota
On June 15, 1944 [correction] *Aug. 23*

LOCAL BOARD PLEASE NOTE: Registrant should be entrained for Hill City via Edgemont, S. Dak. on the C. B. and O. Railroad and must arrive in Edgemont on early morning train 41 in order to make connections with the train for Hill City, or *he should be entrained for Hill City, via Rapid City, S. Dak., whichever may be the more convenient.*

State Headquarters will immediately submit one copy of this form to the Local Board and retain one copy for its files.

Note that the time for reporting to the civilian camp is specified and this D. S. S. Form 49 must reach the Local Board so that D. S. S. Form 50 can be mailed to the Registrant in time to allow 10 days' notice before reporting for transportation.

Upon receipt of this notice, the Local Board shall prepare six copies of Order to Report for Work of National Importance (D. S. S. Form 50). The registrant shall be sent directly to the camp specified; the Local Board shall provide the transportation and meal or lodging tickets necessary.

Lewis B. Hershey,

LEWIS B. HERSHEY
Director.

Government's Exhibit 3

ORDER TO REPORT FOR WORK OF NATIONAL IMPORTANCE

[DSS Form 50]

[Local Board Date Stamp]
Local Board No. 1
Macoupin County
AUG 8 1944
Burton Building
Carlinville, Illinois

August 8, 1944
(Date of mailing)

THE PRESIDENT OF THE UNITED STATES,
To *Taze Hamrick Gibson*
Home address *1441 Main St. Buffalo, New York*
Order No. *12064*

GREETING:

Having been found to be acceptable for work of national importance under civilian direction, you have been assigned to the *Civilian Public Service* Camp *No. 57* located at *Hill City, Pennington County* in the State of *South Dakota.*

You are ordered to report to the local board named above at *2:00 p.* m. on the *21st* day of *August* 1944, where you will be furnished transportation and given instructions to proceed to the camp.

You are ordered to report to the camp pursuant to the instructions of the local board, to remain in the camp, and to perform your prescribed duties until such time as you are released or transferred by proper authority.

You will be examined at the camp for communicable diseases and instructed as to your duties.

Failure to report promptly at the hour and on the day named in this notice or to proceed to the camp pursuant to instructions or to remain in the camp and perform your duties until released or transferred by proper authority will

constitute a violation of the Selective Training and Service Act of 1940, as amended, and may subject you to punishment by fine or imprisonment or both.

Keep this form and bring it with you when you report.

[s] *Wilma Bates*
Clerk of the Local Board

* * *

INSTRUCTIONS FOR CAMP DIRECTOR

When the registrant reports to the camp, the Camp Director will fill in the lines below and mail four copies to the Director of Selective Service, 21st and C Streets NW., Washington, D. C. He will return one copy for the camp files.

The registrant reported on the *23rd* day of August 1944
Civilian Public Service Camp No. 57, Hill City, S. Dak.

[s] *Oscar W. Wiebe, Acting* Camp Director.

* * *

Defendant's Exhibit A

J. N. Weaver

National Service Board

Box 1636

Washington 13, D. C.

Re: Taze H. Gibson NSB121

Dear Mr. Weaver:

Enclosed you will find the NSB121 for the above relating to a ten-day AWOL period.

The assignee reported to camp in order to complete the administrative processes incident to induction. His letter which is a part of the 121 form explains his reason and position.

You will distribute the attached forms as per your instructions.

Very sincerely yours,

[s] Paul G. Tschetter

Paul G. Tschetter

PGT: LL

enc.

Defendant's Exhibit B

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21st and C Streets NW.
Washington 25, D. C.

In replying address
The Director of Selective Service
and refer to No.
3-151

December 5, 1944

Mr. Atlee Beechy, Director
Civilian Public Service Camp No. 57
Hill City, South Dakota

Subject: Taze Hamrick Gibson

Order No. 12,064
Union County Local Board "A"

Dear Mr. Beechy:

Enclosed find the First Copy of the D.S.S. Form 221 for the above-named assignee who reported at your camp on August 28, 1944 and deserted on August 28, 1944.

This form has been forwarded at our request, and we are sending the First Copy to you so that your file on this assignee may be complete.

For The Director
[s] Walfred Lindstrom
WALFRED LINDSTROM
Major, AUS
Camp Operations

Enclosure: D.S.S. Form 221 (First Copy)

Defendant's Exhibit C

PERSONNEL RECORD

Date *Aug. 24, 1944*

Name *Gibson, Taze Hamrick* Date of Birth *Sept. 14, 1922*

Home address *Box 71, White Hall, Ill.*

Local Draft Board *A, El Dorado, Ark.*

Date Reported to Camp *Aug. 23, 1944*

EDUCATION:

Elementary Grade School, Grade Completed *8*

High School *Collinsville, Miss* Years *1* Year *1939*

* * *

WORK EXPERIENCE:

List actual jobs or positions which you have held:

Occupation *Minister and Missionary*

Your Duties *Preaching gospel of God's Kingdom*

Employer *Direct representative of Watchtower Bible & Tract Society*

Length of Service *Ordained in 1938 Full time minister work from 1940 to present.*

Occupation for which you have prepared *Ministry*

* * *

Further remarks *Walked out of camp Aug. 28, 1944*

Defendant's Exhibit D

NATIONAL SERVICE BOARD
for RELIGIOUS OBJECTORS
[NSB 107]

INDIVIDUAL RECORD OF CAMPEE

Camp No. *57 Hill City, S. Dak.*

Name: *Gibson, Taze Hamrick* Address: *Box 82, Virden, Ill.*

Order No. *12,064*

Religious Affiliation *Jehovah's Witness*

Entered Camp: *August 23 1944*

* * *

STATEMENT OF PERSON EXAMINED

Do you consider that you are now sound and well? *Yes* * * *

What illnesses, diseases, or accidents have you had since childhood? *None*

Have you ever had any of the following? If so, give dates: Spells of unconsciousness, convulsions, or fits *No* * * *

Are you addicted to the use of habit-forming drugs or narcotics? *No*

Have you ever since childhood wet the bed while asleep? *No*

Have you ever raised or spat up blood? *No* * * *

Have you ever been under treatment at a hospital or asylum? *No*

* * *

I certify that the foregoing questions and my answers hereto have been read over to me; that I fully understand the questions, and that my answers thereto are correctly recorded and true in all respects.

Place *Hill City S. Dakota* *Taze H. Gibson*

(Signature of person examined)

Date *August 24, 1944*

If examining physician finds assignee unfit for work of national importance under civilian direction, Camp Director must notify the National Service Board Immediately.

PHYSICAL EXAMINATION TO BE MADE ON ADMISSION TO CAMP

1. Eye abnormalities *None*

2. Ear, nose, throat abnormalities *None*

* * *

19. Summary of defects in order of importance, impression of physical fitness *Physical fitness good*

* * *

Date *Hill City, S. D.*

Place *Hill City, S. D.* *E B Hultz*

(Signature of Examining Physician)

Defendant's Exhibit E

TO WHOM THIS MAY CONCERN:

This is to certify to the fact that Taze Hamrick Gibson, Order No. 12064, White Hall, Illinois, did report to Civilian Public Service Camp 57, Hill City, South Dakota, as executed in the form DSS 50, on August 23, 1944, and did complete certain other preliminaries to beginning Work of National Importance customary to any registrant who is inducted to a Civilian Public Service Camp, and after handing me a statement of his case and attached papers in evidence thereof, claimed wrong classification, and did on August 28, 1944 leave Camp voluntarily.

Date *August 28, 1944*

Signed *Paul G. Tschetter*
Paul G. Tschetter
Camp Director
C.P.S. Camp 57
Hill City, S. Dak.

Defendant's Exhibit F

Taze Hamrick Gibson
Box 71
White Hall, Illinois
August 18 1944.

Mr. Paul G. Tschetter
Camp Director
C.P.S. Camp No. 57
Hill City, South Dakota
Dear Sir:

Due to the fact that I am a duly ordained minister of the Gospel I wish to submit to you this statement to further substantiate my claim for a 4-D classification and to show that an injustice has been done on the part of the draft board by ordering me to report to a C.P.S. Camp after classifying me in 4-E.

Since my baptism and ordination in 1938 I have been regularly preaching the good news of God's righteous Kingdom. As shown by my "Letter of Ordination" a copy of which I submit with this statment I was sent forth in 1940 in the full time ministry work as a direct representative of The Watchtower Bible and Tract Society and as a pioneer of Jehovah's witnesses to definitely assigned territory to organize bible study groups and to establish churches and to generally preach the Gospel from door to door as in the manner of Christ Jesus and the apostles. This Gospel preaching is done to-day by word of mouth, by recorded speeches and by leaving with the people bibles and bible helps.

I did my first ministry work in the local congregation of Jehovah's witnesses at Meridian, Miss. in 1938 and this I continued to do until I entered the full time ministry work in 1940 and was sent to Hattiesburg, Miss. In the fall of 1940 I was sent to Macon, Miss., where I carried on the ministry work in the rural sections and was also connected with the company of Jehovah's witnesses at Macon, Miss. In the fall

of 1941 after working at secular work a short time, and preaching the Gospel in my spare time I was sent from Macon to El Dorado, Ark. and acted as company servant in the El Dorado company of Jehovah's witnesses. I carried on the ministry work here until Oct. 1942 when I left to carry forward the ministry work in Muskogee Okla. In Feb. of 1943 I was sent to Enid, Okla. where I remained until July 1943. I was then sent to establish a congregation in the town of Virden, Ill. where I remained until October 1943. I was then sent to Geneseo Ill. where I remained until Apr. 1944 when I was sent to White Hall, Illinois where I am at the present.

I registered under the Selective Service law in June 1942 and in Oct. 1942 I received my questionnaire, properly filled it out and furnished proof of my ministerial status. Local Board "A" at El Dorado, Ark. completely ignored my claim for a 4-D classification and unjustly classified me in 1-A in November 1942. I immediately appealed to the appeal board and after I had gone to Enid, Okla. I received a notice to appear on Feb. 12, 1943 before R. S. Wilson hearing officer for the Department of Justice at Van Buren, Ark. I appeared for the hearing and on May 8th 1943 I was sent a 4-E classification by the appeal board. I then filed a statement with my local board asking them to reconsider by case and filed affidavits from other Jehovah's witnesses as proof that I was a full time minister of the Gospel. This was also ignored and I immediately wrote the State Director asking him to take an appeal in my behalf but this he refused to do. On May 24th I wrote National Headquarters of Selective Service System asking that an appeal be taken in my behalf as all efforts to obtain the proper classification in the local and State Selective Service System had been exhausted. Soon I was notified that National Headquarters had sent for my file but evidently no appeal was taken because I was ordered to report for a Final-Type Physical examination in Sept. of 1943. On July 25th 1944 I was given a preinduction examination and now I have been ordered to report on

August 21st 1944 for induction into Civilian Public Service Camp Number 57 at Hill City, South Dakota. Concerning my ministerial status at present I might add that I spend not under 175 hours per month in the ministry work which is my sole occupation. My congregation is made up of persons of good will toward God and His Kingdom and it is with these people that I conduct bible studies educating them in the truth of God's Word.

Now who but a prejudiced person would deny me the rights guaranteed every individual by the constitution of the United States. One of the four freedoms guaranteed in the post-war era is freedom of worship and now even though the ministry work is of most vital National importance, an attempt is being made to deny me this freedom as I cannot carry on the ministry work in the way that God has commanded in a C.P.S. Camp. I want it clearly understood that I will gladly obey all laws of the land that are not in conflict with Jehovah God's law. Also let it be noted that I have obeyed every order of the draft board up to the present but I cannot remain at the C.P.S. Camp. To do so would be a violation of my conscience. By water Baptism I openly symbolized my consecration to Jehovah God to do His will at all times and this covenant I will keep even unto death. To remain in camp would be breaking my covenant with the almighty God as I cannot carry out my God given commandments there. To me, work in a C.P.S. Camp would be having a part in the bloody conflict that now rages in the earth when our bible clearly shows that a Christian must be entirely neutral in the affairs of this world. (John 17: 14-16 and also John 15: 19) A Christian must follow in the foot steps of Christ Jesus and He as the great Prince of peace was entirely neutral in the controversies and affairs of this world. (Mat. 4: 8-10 and John 17: 16) I am not against the war effort of this country but my hope is in the coming Kingdom that Jesus told his followers to pray for and of which righteous conditions are foretold in the holy scriptures. (Isa. 25: 6-8 and 65: 17-25 and 2: 4) (Micah 4: 3, 4) (Isa. 9: 6, 7)

(Mat. 6:10) As shown at Isa. 43:10-12 and at Isa. 61:1, 2 I am commissioned, not by men, but by Jehovah God to tell of this righteous Kingdom to all who will hear and there is no work on the face of the earth as essential as this.

Again let me say that I want to obey all laws of man that are not in conflict with God's law, but when the laws do conflict then I must obey God rather than man (Acts 5:29).

For the above stated reasons I cannot and will not remain in a C.P.S. Camp.

Yours very sincerely,
[s] Taze Hamrick Gibson
Taze Hamrick Gibson

WATCHTOWER
BIBLE AND TRACT SOCIETY
INCORPORATED
'THIS KINGDOM GOSPEL MUST BE PREACHED'

PUBLISHING 117 ADAMS STREET BROOKLYN, N. Y.

July 5, 1941

SD-SS

TO WHOM IT MAY CONCERN.

This is to certify that Taze Gibson has been associated with the Watchtower Bible & Tract Society, Inc., according to our records, since 1937.

He was baptized in 1938 and was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory in 1940.

Mr. Gibson's entire time is devoted to missionary work. He has declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God. He has taken a course of study in the Bible and Bible helps prescribed by this Society and has shown himself apt to preach and teach "this Gospel of the Kingdom". Matthew 24:14.

He has the Scriptural ordination to preach "this Gospel of the Kingdom." Isaiah 61:1, 2; Isaiah 52:7. He is, therefore, declared by this Society a duly ordained minister of the Gospel and is authorized to represent the Society and preach "this Gospel of the Kingdom", proclaiming the name of Jehovah God and Christ Jesus his King.

Watchtower B. & T. Society, Inc.
[s] N H Knorr Vice-President

[s] T. J Sullivan
Superintendent of Evangelists

Subscribed and sworn to before me this 5th day of July 1941.

[s] William K. Jackson
[Seal] NOTARY PUBLIC Kings County

FILE COPY

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HAYDEN C. COVINGTON
Counsel for Petitioner

No. 86

GEORGE WILLIAM DODEZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAYDEN C. COVINGTON VICTOR F. SCHMIDT
Counsel for Petitioner

JOINT BRIEF FOR PETITIONERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

No. 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
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□

No. 86

GEORGE WILLIAM DODEZ, *Petitioner*

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□

JOINT BRIEF FOR PETITIONERS

Statement of Gibson Case

Jurisdiction

This court has jurisdiction of this case under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court May 7, 1934. The judgment of the Circuit Court of Appeals was entered June 15, 1945. [96]* Petition for writ of certiorari was filed July 13, 1945, and was granted October 22, 1945. [101] 66 S. Ct. 96, 172, 677.

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. [92-95] It is reported at 149 F. 2d 751.

Statute and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.5, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

* All figures in this brief appearing in brackets denote pages of the printed record.

Questions Presented

(1) Did Gibson's reporting at the civilian public service camp pursuant to order and his subsequent leaving it immediately after acceptance and examination constitute a waiver of his right to challenge the jurisdiction of the Selective Service System over him in his defense against the indictment based upon the administrative action?

(2) Does the Act deprive Gibson, charged by indictment with desertion from the civilian public service camp, of the same defenses that would be available to him if he had not reported at the camp, or the same rights that would have been available to him if he had remained at the camp and applied for a writ of habeas corpus?

(3) Did the courts below commit reversible error in holding that Gibson could not assert the want of jurisdiction of the draft boards and the illegality of the administrative orders supporting the authority of the civilian public service camp whose authority and orders he is charged by indictment with defying?

(4) Does the construction placed upon the Act and Regulations, so as to deny Gibson the right to challenge the jurisdiction of the draft boards and the legality of the orders supporting the authority of the civilian public service camp, deny Gibson his right to due process of law, contrary to the First Amendment to the United States Constitution, and a judicial trial, contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution?

(5) Did the trial court commit reversible error in excluding the proof offered by Gibson and in refusing the requested finding of fact which tendered the issue of Gibson's good faith and honest belief that he was exempt from training and service and that the civilian public service camp director had no jurisdiction to command him to remain at the camp?

(6) Did the trial court err in denying Gibson's motion to quash the indictment, motion for a finding of not guilty and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for findings of fact and conclusions of law, all of which pertained to the illegality of the administrative order?

Form and History of Action

This criminal action was instituted in the District Court of the United States for the District of South Dakota by return of an indictment charging Gibson with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-4] The indictment charges that Gibson, on August 23, 1944, reported at a civilian public service camp at Hill City, South Dakota, and was enrolled there for work of national importance. It is further alleged that on August 28, 1944, he left said camp with the intention of remaining away. The indictment charges that such conduct constituted a violation of section 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. S. C. § 311). [2-3]

Before pleading to the indictment Gibson duly filed and presented his motion to quash the indictment. [8-15] It was overruled by the court. [19] Thereafter he pleaded "not guilty" on February 13, 1945. [29] A trial by jury was waived and the case was heard by United States District Judge A. Lee Wyman, for the District of South Dakota. [29] The trial without jury began on February 13, 1945. [29] At the close of all the evidence, Gibson moved for dismissal of the indictment, a judgment of acquittal and a finding of "not guilty", stating extensively his reasons. [15-19] On denial of that motion Gibson excepted. [20, 77-78] At the close of all the evidence he submitted to the court his requested findings and conclusions, all of which were refused and exceptions allowed. [78]

The court found petitioner guilty. [21-22, 23-24, 78] Petitioner excepted to the finding. [22-23] He was sentenced to five years and committed to the custody of the Attorney General in such place of confinement as may be designated. [24-25, 83] Petitioner served and filed his written notice of appeal. [25, 26, 27, 83] He timely filed his assignments of error which supported each ground of his appeal. In due course the cause was argued and submitted to the United States Circuit Court of Appeals for the Eighth Circuit. [96] The judgment of conviction was affirmed by that court June 15, 1945. [96, 97]

Facts

Gibson, now 24 years of age, registered under the Selective Training and Service Act of 1940 on June 30, 1942, with local board A of El Dorado, Arkansas. [30, 64] He was assigned order number 12064 with said board. [30] He timely filed, on October 12, 1942, a Selective Service Questionnaire answering questions required of him and in Series VIII thereof he made declaration pertaining to his status as a minister of religion. [30-31, 64]

In his questionnaire he stated:

'I have completed 8 years of elementary school and 1 year of high school. I have had the following schooling other than elementary and high school: Divinity school; course of study, Ministry; have attended a full two years and still attend.

'The job I am now working at is minister of religion. I do the following kind of work in my present job: Preaching the Kingdom of God for which Jesus taught his followers to pray (Matthew 6:10).

'I have also worked at the following occupations other than my present job, during the past 5 years: Farm laborer, farming from 1934 to 1940. My usual occupation, or the occupation for which I am best fitted, is ministry work.

'I prefer the following kind of work: Ministry work.

I would not consider accepting a job which would require me to move away from my present home.

'I am a minister of religion. I do customarily serve as a minister. I have been a minister of Jehovah's witnesses since June 1938. I have been formally ordained. My ordination was performed on September 9, 1938 by Brother Miller at Birmingham, Alabama. I am a student preparing for the ministry in a theological or divinity school. I am attending the Watchtower Bible and Tract Society, which was established before September 16, 1939, and is located at 117 Adams Street, Brooklyn, New York.' [30, 31, 64] (Government's Exhibit 1).

Gibson in his questionnaire claimed classification of IV-D, the classification given ministers of religion under Section 5 (d) of the Act. He showed that he devoted substantially full time to the performance of his work as a minister of religion. [30, 64]

The local board, on November 6, 1942, denied his claim for exemption and placed him in Class I-A, as liable for training and service in the armed forces. [30] He duly and timely appealed. [30] The board of appeal, on May 8, 1943, upon consideration of his draft board file, reversed the classification of the local board and placed Gibson in Class IV-E, thereby denying his claim for exemption from training and service as a minister of religion under Section 5 (d) of the Act and making him liable for service in a civilian public service camp as a conscientious objector. [30] (Government's Exhibit No. 1)

Gibson wrote to the State Director and requested him to appeal the determination to the President and to stay the induction process. [50-51, 69] The State Director did not take action. The National Director was requested to take action in behalf of petitioner by appealing the determination to the President. [50-51, 69] On a review of the case, the National Director refused to take an appeal. [69]

On May 23, 1944, Gibson was assigned to do work in a civilian public service camp. [30, 31] On or about September 1, 1943, Gibson was commanded to appear on September 22, 1943, for a preinduction physical examination. [51, 69] In 1944 he was again given such an examination and later notified by his local board that he had been found "physically fit" and accepted for 'civilian service'. [51-52, 69]

On August 8, 1944, the local board mailed to him an Order to Report for Work of National Importance, that commanded him to appear at the local board in Carlinville, Illinois, at 2 p.m. on August 21, 1944. [30, 31, 69] On that date he did appear at that local board and received his transportation to the camp in South Dakota. [30, 70] Thereupon he proceeded from the local board to the Civilian Public Service Camp at Hill City, South Dakota, where he remained until August 28, 1944, when he was given a physical examination. [30-31, 70]

On arrival at the camp Gibson found that the camp director and camp physician were away. [70] After staying at the camp three days without performing any work whatever, Gibson finally saw the camp physician upon his return. [70-71] He was examined and found physically acceptable. [70-71] He did not report to do work of national importance. [22, 30] The civilian public service camp reported that Gibson appeared at the camp to complete the administrative processes incident to induction. [33-34] (Petitioner's Exhibit A) The camp records also showed that Gibson was a missionary evangelist engaged in preaching the gospel of God's kingdom as a direct representative of the Watchtower Bible and Tract Society and that he was ordained in 1938 and had been engaged in the ministry work full time since 1940. [36] (Petitioner's Exhibit C) The report of the examining physician was received in evidence and showed that Gibson had been declared acceptable and found to be physically fit. [36] (Petitioner's Exhibit D)

After completion of the physical examination Gibson talked to the camp director immediately after arrival of the director at the camp. [33, 71] The first thing Gibson did was to hand to the camp director a typewritten letter reviewing the history of his work as a minister and the history of his efforts to obtain an exempt classification as a minister of religion from the draft boards. [33, 71] Gibson then told the camp director that he was in a covenant with Almighty God JEHOVAH to do His will by preaching the gospel of God's Kingdom, which must be proclaimed to all nations. He also informed the director that he did not ask the draft boards to give him a "conscientious objector" classification, but that the undisputed evidence in his draft board file showed he should have been given the exempt classification of IV-D which is given to all ministers of religion. [33-34, 71-72] Moreover, he pointed out that he had obeyed every order of the boards including their unlawful order to report to the camp. [70-71] He further informed the camp director that, as stated in the letter, he could not stay at the camp. [31-34, 71-72] The director told him that he would be prosecuted if he left the camp. [31-38, 74-75] Gibson replied that if he was it would not be the first time a Christian had been punished for following Christ Jesus; that Christ Jesus had been unlawfully charged, tried and convicted because of keeping His covenant with Jehovah God, as well as His apostles; that since Jesus' apostles refused to step aside from their preaching work and follow the command of the governments of their day, so also he (Gibson) as a Christian must follow in their footsteps. [74-75] He also pointed out to the director that he must obey God rather than the unlawful commands of the draft boards and the operators of the camp; that he stood in the same position of the three Hebrews who, when ordered to bow down and worship the golden image in ancient Babylon, firmly refused and for such refusal were thrown into the burning fiery furnace. [74-75] Gibson said that he would say, as

did the three faithful Hebrews, that if God sees fit to deliver him he will do so but that if God sees fit not to deliver him he, nevertheless, will continue to obey God regardless of the consequences. [74-75]

Before leaving, Gibson told the camp director that he had reported to the camp only to exhaust the administrative process in order to obtain correction of the illegal classification of the draft boards. [38-39] He then asked the director to give him a statement showing that he had reported in camp on August 23, 1944, and that after completing the administrative process, without performing any work, he left the camp voluntarily. [33-34] (Petitioner's Exhibit E) Upon receiving this statement from the director, Gibson left the camp. [33-34, 38-39]

Thereupon Gibson returned to his missionary field and resumed his evangelistic ministry in Indiana. He was arrested by an agent of the Federal Bureau of Investigation on December 2, 1944, under a charge of violating the Selective Training and Service Act of 1940. [44, 45-46, 65]

Gibson testified that he attended a divinity school, preparing to become a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a religious organization recognized by the Selective Service System, from 1935 to 1938. [61] That he had been a minister of that organization since 1938 and that he had been a full-time pioneer minister, devoting substantially his full time, since the fall of 1940. [61-62] That he was engaged primarily in carrying out his Christian duties as a minister of the gospel by engaging in evangelistic work of calling upon the people from house to house, locating people of good will toward Almighty God and the work of Jehovah's witnesses and in arranging for conduct of Bible studies in homes of the people interested in that work, and by public street preaching by distribution of literature containing Bible sermons, in Macon, Mississippi; El Dorado, Arkansas; Enid, Okla-

homa; Verdun, Illinois; and Clinton, Indiana. [59-66] That he also performed regular ministerial duties in connection with the congregation of Jehovah's witnesses located in El Dorado, Arkansas, where he each week delivered sermons and performed ministerial duties to that congregation as its minister and as assistant to the presiding elder of the congregation. [59-63, 64, 65-66]

How Issues Raised

By motion to quash, Gibson challenged the constitutionality of the criminal sanctions clause of the Act because if the only means of challenging the illegality of the action of the draft boards was by writ of habeas corpus, it deprived him of his constitutional rights of due process and converted the Act into a "bill of attainder" contrary to the Constitution. [9] Moreover, in the same motion he asserted that the Act and Regulations had been construed so as to require him to report in South Dakota to exhaust his administrative remedies, forcing him to stand trial in a strange, far-away district and State where the controversy did not arise, making it impossible for him to obtain compulsory subpoena powers over his witnesses, all of which was arbitrary, unjust, unreasonable and depriving him of his rights and liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution. [8-11] The motion to quash was overruled, to which Gibson excepted. [19, 29]

Although the trial court allowed the Government to introduce into evidence the questionnaire, documentary evidence attached to it by Gibson was excluded from evidence. [31, 48-52] All material and relevant documents filed in Gibson's Cover Sheet with the draft board that were considered by the administrative agency in arriving at his final classification, whereby he was denied his exemption from duty as a minister of religion, were identified and offered

in evidence. [48-52, 52-56] These various documents were excluded from the evidence by the trial court despite the fact that they were offered to show that the order on which the indictment was based was illegal, arbitrary and capricious, *ultra vires*, without jurisdiction, contrary to law, without support of any substantial evidence, contrary to the undisputed evidence, and contrary to the due process clause of the Fifth Amendment. [48-56] Exception was duly taken to the action of the trial court in excluding this documentary evidence. [56-57] Gibson requested the court to try the issue of his exemption from duty and want of authority of the draft board *de novo*. [47-48, 57-58, 66-68] He offered his own testimony, as well as that of another witness. [57-58, 66-68] By the *de novo* evidence thus offered he attempted to prove that he performed his work as a minister of religion without commercial gain; that he was an ordained minister of religion; that he stood in relation to congregations of Jehovah's witnesses as do ministers of the popular orthodox religious denominations. [57-58, 66-68] Moreover, he offered to show *de novo* that he regularly performed duties and ceremonies like those ordinarily performed by ministers of the orthodox religions, such as baptismal, memorial, burial, and other ceremonies usually performed only by ministers of religion. [57-58, 66-68] Additionally, he offered to show that he was recognized by others of Jehovah's witnesses and by other persons not Jehovah's witnesses as standing in the same relation to the Watchtower Bible and Tract Society and Jehovah's witnesses as do the regular and ordained ministers of orthodox religions. [57-58, 66-68] This evidence offered for the purpose of review *de novo* was excluded by the trial court, to which exception was duly taken and allowed. [59, 69]

Gibson duly urged his motion for dismissal of the indictment and for judgment of acquittal at the close of all the evidence. [15-19, 77-78] The grounds of the motion were that the undisputed evidence showed that the draft board

order was void because the administrative agency had acted contrary to the Act, the Regulations and the due process clause of the Fifth Amendment in ordering Gibson to report for work of national importance. Additional grounds were urged. [15-19] The motion was denied, to which exception was allowed. [20]

Gibson duly requested findings of fact and conclusions of law urging the court to find that the administrative order on which the indictment was based was illegal and void. [78] These requests were overruled, to which exceptions were allowed. [78] To the formal finding of guilty and written findings of fact made by the trial court Gibson duly objected and excepted. [22-23]

Specifications of Error

Gibson relies upon every one of his assignments of error duly filed in the trial court as grounds for reversal of the judgment of conviction.

[Points for JOINT ARGUMENT of *Gibson* and *Dodez* cases appear at pages 28-29, *infra*.]

Statement of Dodez Case

Jurisdiction

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934. The judgment of the Circuit Court of Appeals was entered March 18, 1946. [189]

Petition for writ of certiorari was granted on May 6, 1946. 66 S. Ct. 1017.

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. [189-200] It is reported at 154 F. 2d 637.

Statute and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.5, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

(1) Does acceptance upon preinduction physical examination of one classified as a conscientious objector constitute completion of the selective process and exhaustion of administrative remedies so as to qualify Dodez to challenge the legality of the administrative action in defense to an indictment charging him with failure to report for work of national importance in a civilian public service camp?

(2) Did the courts below err in holding that the rule of *Falbo* v. *United States* (320 U. S. 549) applied and that the rule of *Estep* v. *United States* (66 S. Ct. 423) did not control?

(3) Did the trial court err in refusing to allow Dodez the right to show, and in refusing the jury the right to consider that the order on which the indictment was based is void because Dodez is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving Dodez of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(4) Did the trial err in holding that it and the jury could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided to whether or not Dodez knowingly failed to report for work of national importance?

(5) Does the construction placed upon the Act and Regulations by the courts below, requiring Dodez to report at a civilian public service camp for work of national importance as a condition precedent to judicial review of the illegality and unconstitutionality of the action of the

Selective Service System, violate Clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(6) Did the trial court err in denying Dodez' motion to quash the indictment, motion for an instructed verdict and for a judgment of acquittal, in excluding proffered evidence, in denying requests for charges and in charging the jury, all of which pertained to the illegality of the administrative order?

Form and History of Action

This criminal action was instituted by indictment returned against Dodez charging him with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-3]

The indictment charged that Dodez, a registrant classified as a conscientious objector, "did knowingly, willfully, unlawfully and feloniously, fail to perform such duty required of him; that is to say, that the said defendant, did fail to report for work of national importance as ordered by said Board". [3]

Thereafter Dodez pleaded "not guilty". [3] He filed a motion to quash the indictment on the grounds that the construction placed upon the criminal sanctions clause so as to deny him his right to show, in defense to the indictment, that the orders of the Selective Service System were void and illegal, violated the Constitution of the United States. [35] The motion to quash was overruled, after argument to the court, on December 7, 1944. [9] The trial to a jury before the court began on December 7, 1944. [9] The court excluded and received evidence upon the trial. The case closed when all the evidence was in on December 7, 1944. [3, 67] At the close of the evidence, Dodez moved for dismissal of the indictment and for a judgment of acquittal [6-8, 16, 65, 127-130] and for a directed verdict of not guilty. [6-8, 16, 65, 127-130] In these motions the

reasons were stated extensively. [6-8] The motions were denied with exceptions to Dodez. [16, 65] Dodez duly submitted to the court, before argument of counsel to the jury, his requested instruction to the jury. [66-101]

On December 8, 1944, the cause was argued to the jury by counsel. [60-104] Thereupon the court charged the jury. [104-108] The court refused all of Dodez' requested charges to the jury and allowed exceptions to his ruling. [109] Dodez duly objected and excepted to the court's charge. [109-111] The jury retired to consider the verdict at 2:00 p.m. [12] The jury rendered its verdict of guilty on December 8, 1944, at 3:00 p.m. [112, 127] On December 15, 1944, the United States District Judge rendered judgment upon the verdict and sentenced Dodez, committing him to the custody of the Attorney General for a period of five years. [121, 130-131]

Dodez duly served and filed his written notice of appeal in the time and manner required by law. [132] He timely filed his assignments of error which support each ground of this petition. [135-142] In due course the case was argued and submitted to the United States Circuit Court of Appeals for the Sixth Circuit. The judgment of conviction was affirmed by that court on March 18, 1946. [189]

Facts

Dodez registered pursuant to the Selective Training and Service Act on June 30, 1942. [156] On September 21, 1942, he filed his Selective Service Questionnaire. [146] He showed his occupation to be that of a duly ordained minister of religion since January 1941. [17, 146-148] In his questionnaire he asserted: "In view of the facts set forth in this Questionnaire it is my opinion that my classification should be 4D." [18, 148] He filed with his questionnaire certificates of ordination showing that he was recog-

nized by the Watchtower Society, the legal governing body of Jehovah's witnesses, as an ordained minister of the gospel. [157-159] Affidavits were also filed showing that Dodez' full time was devoted to the regular performance of his duties as a minister of religion and that he stood in relation to the congregation of Jehovah's witnesses as do the ministers of orthodox denominations. [159-165] On November 25, 1942, the local board classified him in Class I-A, sending him notice thereof on November 30, 1942. [150] Thereafter, on December 3, 1942, he requested a personal appearance before the local board pursuant to the Regulations. [167-168] On December 7, 1942, he appeared before the local board and submitted a petition signed by forty-four persons stating that they recognized him as a minister of Jehovah's witnesses and the Watchtower Society and that he regularly preached and taught the principles of Jehovah's witnesses. [168-169] At such personal appearance the local board denied him a full hearing but evidence of the denial was excluded from the record. An offer of proof was made. [33-36] He was continued in Class I-A on December 7, 1942, notice thereof being mailed to him on December 8, 1942. [150] Dodez thereafter requested a rehearing for the opportunity to present additional evidence. This proof was rejected by the court [36-37]

He appealed to the board of appeal on December 17, 1942. [149] In his notice of appeal he complained of the failure of the local board to give him a full and fair hearing. He also complained of the refusal of the local board to grant him a rehearing in order to enable him to offer additional evidence. [170] He accused the local board of being prejudiced, unfair and capricious. [171] Pending the determination of his appeal, he notified the local board that he had been appointed as the presiding minister of the congregation of Jehovah's witnesses at Wooster, Ohio. [172-173]

On June 11, 1943, he was notified that the board of appeal had reclassified him to Class IV-E, [150] which made him liable to do work of national importance in a civilian public service camp. Thereafter he attempted to have his case reopened. In dealing with the Government Appeal Agent and members of the local board, there were statements made about prejudice on the part of the local board. However, evidence as to this was excluded by the court. It is shown in an offer of proof. [37-44]

Additional evidence was submitted and request again made to have his classification reopened in January 1944. Such evidence consisted of an affidavit and petition stating that Dodez regularly and customarily served as and performed the duties of a duly ordained minister and presiding minister over the congregation of Jehovah's witnesses, teaching and preaching the beliefs of Jehovah's witnesses, and certifying that he was authorized to perform marriages, baptism, funeral and other ceremonies generally performed by ordained ministers. [174] The signers of the petition alleged that it would result in a hardship to them if petitioner was taken away from the congregation. [174-176] With this was submitted a certificate issued May 18, 1943, by the State of Ohio, licensing Dodez to solemnize marriages within the State of Ohio as long as he continued as a minister of the Watchtower Society. [176] This additional proof was accompanied by a letter to the local board. [179-180] The local board declined to reopen his classification.

On February 10, 1944, Dodez was mailed an Order to Report Preinduction Physical Examination directing him to appear at the local board located at 243 West Market Street, Orrville, Ohio, on February 21, 1944. [182-183] He appeared as directed and was thereafter given preinduction physical examination at the induction station on February 21, 1944. [150, 184-186] Certificate of Fitness was thereafter sent to Dodez on February 28, 1944. [150, 184-185] It certified that Dodez, after having been examined

upon a preinduction physical examination, had been declared "Physically fit, acceptable by Army for general military service". [51-52, 184-195] The report of Physical Examination, dated February 21, 1944, appears in the Record. [185-186]

On April 8, 1944, Dodez was ordered to report for work of national importance. [150, 155-156] The order recited that he had been assigned to C. P. S. Camp No. 28, at Medaryville, Indiana. It commanded him to appear at his local board at 5 a.m. on April 21, 1944. [150, 155] On April 19, 1944, Dodez, by letter, acknowledged receipt of the Order to Report for Work of National Importance. [186-187] He reviewed the illegality of the action of the administrative agency and, for the reasons stated in his letter, declared that he would not report because he could not turn aside from and quit his preaching occupation that he was bound to perform in accordance with the covenant made with Almighty God. [186-187] Dodez failed to report at the local board, as commanded, to do work of national importance. [14-15, 150]

How Issues Raised

By motion to quash the indictment Dodez claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and orders based thereon. [35] He asserted that if the Act and Regulations were so construed as to deny him these defenses, they were unconstitutional because a Bill of Attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution; because they surrendered the judicial power to the draft boards contrary to Article III of the Constitution; because they denied the right to a judicial trial contrary to the due process clause of the Fifth Amendment to the United States Constitution, because they deprived him of his right of trial by jury contrary to the

Sixth Amendment to the United States Constitution. [35] The trial court overruled the motion to quash with exception to Dodez. [9, 10]

The trial court erroneously excluded from evidence, over the objection of Dodez, his own testimony offered *de novo* to show his activity as an ordained minister. This testimony was offered for the purpose of showing that Dodez was exempt from all training and service under the Selective Training and Service Act. [30-32]

The trial court erroneously excluded from evidence, over the objection of Dodez, testimony tending to show prejudice and discrimination by the local board against him, and evidence tending to show that the members of the local board had denied him a full and fair hearing before that board. [33-35, 36-44]

The trial court erroneously excluded from evidence, over the objection of Dodez, testimony offered *de novo* by him to establish his background and training for the ministry. [50-51]

At the close of the evidence Dodez moved for a dismissal of the indictment [127-128] and for a directed verdict [128-130] on the grounds that the undisputed evidence showed that the draft board order was void because the board acted in excess of its authority in that Dodez was a minister of religion exempt from all training and service and was not liable for training and service under the Act; that he had exhausted his administrative remedies and was in a position to challenge the action of the administrative agency and the orders on which the indictment was based; that the board had denied him his rights of procedural due process by rejecting the evidence and that the court had construed the Act and Regulations so as to require him to report for work of national importance at a CPS camp as a condition precedent to a judicial review, which denies him the right of a judicial trial contrary to the Constitution

of the United States. [127-130] Each motion was denied with exception to Dodez. [65]

Dodez duly tendered to the court requested charges to the jury. [67-100] The requested charges defined what constituted a regular or duly ordained minister of religion, stated the duties of draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. The court was requested to charge the jury that if they concluded and found that the undisputed evidence before the draft boards showed that Dodez was a minister of religion and of Jehovah's witnesses and there was no substantial evidence that he was not such a minister as claimed, that they could acquit him, by their verdict saying he was not guilty. The court was requested to charge the jury that if they found that the boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations and arbitrarily or capriciously, they could render a verdict of not guilty. [67-100] These requests were each refused separately and exception allowed to each refusal. [66-67, 109]

The court instructed the jury that the only issue to be determined was whether or not Dodez reported for work of national importance, and if the evidence showed that Dodez failed to so report, it would be the duty of the jury to find him guilty. [104-108] Dodez objected and excepted to the court's charge on the grounds that he was thereby denied the right to urge in defense to the indictment that he was exempt from training and service as a minister of religion; that the court instructed the jury to convict him; that the instruction of the court denied him his right to a judicial trial and a trial by jury, and abridged his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution. [109-111]

Throughout the trial, from beginning to end, the court held that the actions of the draft boards were binding upon Dodez, the court and the jury, and that Dodez could not challenge the same on any ground, or that his failure to report for work of national importance was not a willful violation of the Act.

Specification of Errors

Dodez relies upon every one of his assignments of error as grounds for a reversal of the conviction. [135-142]

Summary of Joint Argument

Petitioners were classified as conscientious objectors making them liable for training and service in civilian public service camps. Each was ordered to report at an army induction station for the preinduction physical examination to determine his acceptability prior to assignment to a civilian public service camp. Each was found physically fit and acceptable for training and service.

The acceptance for training and service constituted a completion of the selective process. At this point each petitioner had exhausted the administrative remedies sufficiently to entitle him to challenge the illegality of the administrative action in denying the claim for exemption as a minister of religion. This proposition is conceded by the Government. This concession makes applicable the rule of *Estep* v. *United States,* 66 S. Ct. 423, requiring a reversal of the judgment in the *Dodez* case.

Under the circumstance of the Government's concession (the identical position taken by Nick Falbo upon oral argument in this Court which was emphatically urged in his Second Petition for Rehearing) and since the terms of the Regulations involved in the *Dodez* case are substantially the same as the terms of the Regulations as they existed

at the time Falbo was ordered to report for work of national importance, the *Dodez* case presents to this Court AGAIN the necessity of reconsidering this Court's decision in *Falbo* v. *United States,* 320 U. S. 549. The facts and Regulations in the *Dodez* case require the Court to reverse the position taken in *Falbo* v. *United States, supra.* Petitioners now urge upon the Court to reconsider and declare to be erroneous the decision reached in *Falbo* v. *United States, supra.*

The Court inadvertently misapprehended the Selective Service Regulations in reaching the decision that it reached in the *Falbo* case when it held that the selective process was not completed until the assignee reported at the civilian public service camp for a physical examination where he might be rejected. The Regulations nowhere provided for the physical examination of all registrants reporting at the civilian public service camp. Moreover, the Regulations at that time provided for a final-type physical examination at the army induction station, which is identical with the preinduction physical examination given registrants classified as conscientious objectors at army induction stations under the present Regulations.

If as is conceded, acceptance upon the preinduction physical examination terminates the selective process and constitutes an exhaustion of the administrative remedies under the present Regulations, then by force of the same reason the identical final-type physical examination of the same class of registrants under the Regulations as they existed at the time Falbo was ordered to report for work of national importance should be held to constitute the exhaustion of administrative remedies.

The obvious misapprehension of the Regulations by the Court in the *Falbo* case was due to the equivocation of the Government and its presentation, as to when the administrative remedies were exhausted, in misleading light

upon the oral argument of that case and in its brief. The vigorous argument made by the Government's counsel in his brief and upon oral argument that it was necessary to submit to induction and apply for a writ of habeas corpus, as the only remedy, was a mere decoy whereby the Court was lured into the position it got into in the *Falbo* decision, which was a "trap" for the Court as well as for Falbo.[1] Moreover, in its brief it was stated, "the camp physician shall examine him and he may thereupon be rejected, in which event the local board must classify him IV-F (Reg. 653.11). Thus, as of October 15, 1943, of the 8,000 registrants who had reported at such camps, 610, or approximately 7 percent, were rejected." (Brief for the United States, *Falbo* v. *United States,* No. 73 October Term 1943, p. 56)[2]

The Government argues that Gibson went too far when he reported at the civilian public service camp for the purpose of exhausting his administrative remedies. Gibson was following the advice of this Court which was implicit in the Court's opinion in the *Falbo* case. Since the Regulations in the *Falbo* case *were about the same* as they were at the time Gibson was ordered to report for work of national importance, Gibson could reasonably conclude that the doctrine of the *Falbo* case required him to report at the civil-

[1] It is too late to extricate Falbo from the trap; but, it is not too late for the Court to get out of the trap by correcting its erroneous decision. See Petitioner's Petition for Rehearing, *Falbo* v. *United States,* No. 73 October Term, 1943, p. 2, 84-85. It is never too late to be right.

[2] It should be observed that the Regulation referred to does not even provide for rejection of assignee-registrants whatever. That Regulation provides for an examination of only those registrants who indicated a change in physical condition: "*If* the assignee *indicates* that *his physical condition has changed* since his final type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary." (Emphasis added) Reg. 653.11 (e); Brief for the United States, *Falbo* v. *United States,* No. 73 October Term 1943, pp. 113-114.

ian public service camp to undergo the physical examination.

While there have been some slight changes in Section 653.11 of the Regulations, they are not material in determining whether Gibson waived his right to challenge the legality of the administrative action by going further than reporting for preinduction physical examination. He did not intelligently and knowingly waive his rights. In good faith he attempted to pursue his remedies to the end. His going to the point of undergoing a physical examination following his acceptance by the civilian public service camp nevertheless still did not confer jurisdiction upon the local board that exceeded its authority in ordering him to report for work of national importance, because the undisputed evidence showed that he was exempt by statute from all training and service. The local board did not have jurisdiction. The civilian public service camp could not assume jurisdiction.

Gibson's leaving the camp after undergoing the physical examination by the camp physician did not constitute a separate and distinct offense under the Act which allows no challenge of the want of jurisdiction of the administrative agency over him. If he could challenge the jurisdiction of the agency at the time he exhausted his administrative remedies when he was accepted on the preinduction physical examination, or if he could challenge the jurisdiction of the agency by applying for writ of *habeas corpus*, after remaining at the camp as ordered, then by force of the same reason, he should be able to challenge the want of jurisdiction of the agency in defense to the indictment charging him with violating the Act by failing to remain at the camp after being ordered to report by the administrative agency.

By leaving the civilian public service camp, Gibson in no way waived any of his rights to challenge the want of

jurisdiction on the part of the administrative agency (1) that classified him, (2) that ordered him to report at the said camp, (3) that operated the said camp and (4) that commanded him to remain at the said camp. At all times—from the time of his registration to the time of his departure from the civilian public service camp—he was under the direction and control of the Selective Service System, which operated the camp.

In event that this Court should hold that Gibson went too far and that he waived his rights thereby, then the Court should declare that he was entitled to assert his honest good-faith belief that he was exempt as a minister of religion in defense to the indictment, and hold that the trial court erred in excluding the evidence offered by Gibson on that issue and in refusing his request for finding of fact presenting the issue as a defense against the indictment.

[Points for JOINT ARGUMENT of *Gibson* and *Dodez* cases appear at pages 28-29, *infra.*]

Points for Joint Argument

ONE

Petitioners' acceptance because of physical and mental fitness upon a preinduction physical examination terminated the selective process and exhausted their administrative remedies before the orders to report for work of national importance were issued entitling them to show in response to the indictments that the draft boards exceeded their jurisdiction in denying their claims for exemption from training and service as ministers of religion.

TWO

Gibson's reporting at the civilian public service camp as ordered and leaving it immediately after acceptance and physical examination did not constitute a waiver of his right to challenge the jurisdiction of the Selective Service System in his defense against the indictment.

THREE

The construction placed upon the Act and Regulations by the courts below denies petitioners their right to challenge the jurisdiction of the draft boards and the legality of the orders supporting the authority of the civilian public service camps in violation of due process of law, contrary to the Fifth Amendment to the United States Constitution, and denies them a judicial trial contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution.

FOUR

The holdings of the courts below that petitioners could not challenge the jurisdiction of the draft boards in their trials because they had not resorted to the remedy of *habeas corpus*, were fundamental errors requiring reversal of convictions.

FIVE

The trial court committed reversible error in excluding the proof offered by Gibson, and in refusing the requested finding of fact and conclusion of law tendering the issue of Gibson's good faith and honest belief that he was exempt from training and service and that the civilian public service camp director had no jurisdiction to command him to remain at the camp.

JOINT ARGUMENT

ONE

Petitioners' acceptance because of physical and mental fitness upon a preinduction physical examination terminated the selective process and exhausted their administrative remedies before the orders to report for work of national importance were issued entitling them to show in response to the indictments that the draft boards exceeded their jurisdiction in denying their claims for exemption from training and service as ministers of religion.

The Selective Training and Service Act of 1940 (§3a) in part provides: " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added). The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp." *Falbo* v. *United States*, 320 U. S. 549.

Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination, which is a final-type physical examination for registrants classified as conscientious objectors (Reg. 651.1-651.8). If the conscientious objector is found physically fit, he is then assigned by the National Director of Selective Service to a designated civilian public service camp (Reg. 651.10, 652.1, 652.2). Pursuant to such assignment, the local board issues the order to report for work of national importance. After the conscientious objector has been given a preinduction physical examination and has been assigned

to a particular camp by the National Director, the local board then orders him to report at the board for transportation to the civilian public service camp to which he is assigned (Reg. 652.11). The Regulations provide that after arrival at the camp the registrant shall be examined to ascertain whether there has been a change in his physical or mental condition. But irrespective of the result of the physical examination he is accepted by the camp for work of national importance (Reg. 653.11). He cannot be rejected at the camp. If a change in his condition is found, he is hospitalized. The Regulations provide that the acceptance shall be noted after the physical examination. The camp director is required to place on the form a statement that the registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director (Reg. 653.11).

Acceptance of one classified as a conscientious objector upon a preinduction physical examination ends the selective process, before the order to report for work of national importance issues. For such work each petitioner was ordered to report. Each had been accepted upon the preinduction physical examination which terminated the selective process and exhausted the administrative remedies before he was ordered to report for work of national importance.

In *Billings* v. *Truesdell*, 321 U. S. 542, by a construction of the Regulations and the Act, it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed "acceptable" and is "accepted". The very next step, induction, or submission to work of national importance, was not and is not a part of the *selective process*. Unmistakably, the court pointed out in the *Billings* decision, that the *Falbo* decision was not to be construed as holding that a man must submit to in-

duction before he could be said to have exhausted his administrative remedies, but that the *selective process* ended when he was accepted and that thereafter he could refuse to submit to induction:

"But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Process to more severe penalties than those who stayed away in defiance of the board's order to report."

The foregoing quoted portion of the *Billings* opinion is a forcible demonstration of the misapprehension by the courts below of the Regulations governing petitioners' acceptance and assignment to civilian public service camp. The court of appeals in the *Dodez* case said that "after reviewing *Estep* and *Smith* cases in detail and noting that no attempt is made therein to reverse *Falbo* v. *United States* (supra), we conclude that the *Falbo* and not the *Estep* and *Smith* decisions apply here. We believe the cases are identical since neither Falbo nor Dodez had exhausted his administrative remedies by reporting for *induction*. In the case at bar had draftee so reported and then refused to be *inducted*, the *Estep* and *Smith* decisions would have been controlling." (Emphasis added) [193-194]

It should be observed that it was impossible for petitioners to be inducted at the civilian public service camp. Indeed, there is no induction ceremony at the camp. There is no line drawn in the Regulations whereby a point is fixed permitting the registrant to choose between induction and refusal to be inducted with prosecution under the Act, as in the case of registrants ordered to do training and service in the armed forces. In the case of registrants classified as conscientious objectors, the Regulations provide that the registrant is under the jurisdiction of the

camp to which he is assigned after leaving the local board where he has reported in pursuance to the order commanding him to do work of national importance. (Reg. 652.13) It is manifest that the courts below confused the distinction between the well defined procedure of registrants ordered to do work of national importance and registrants ordered to do training and service in the armed forces. The fact that one classified in I-A may be said not to exhaust his remedies until he has undergone the final physical examination at the induction station given by the armed forces upon his reporting pursuant to an order to report for induction, cannot be taken as a guide for determination that a registrant classified in IV-E has not exhausted his remedies until he has reported at the civilian public service camp. Since it is impossible for a registrant to be rejected at the civilian public service camp, and inasmuch as there is no physical examination given at said camp for the purpose of determining the acceptability of the registrant, it is unnecessary for one classified as a conscientious objector to report to the local board or to the CPS camp in response to an order to report for work of national importance in order to exhaust his administrative remedies. Indeed the remedies have been exhausted upon the taking of the preinduction physical examination long before the order to report for work of national importance is issued.

When each petitioner was found physically fit and acceptable for general military service upon his preinduction physical examination at the induction station *he was acceptable* for work of national importance under civilian direction. This acceptance was before the orders to report to the camp had issued. Each had been officially and finally *accepted*, as indicated by the subsequent notice to report to camp, sent by the Director of Selective Service who is in charge of the CPS camps. (Reg. 653) Thus each petitioner exhausted his administrative remedies and, under

the rules set forth in the *Falbo* opinion itself as amended and clarified by the *Billings* opinion, he was then in a position to urge the illegality of his classification as a defense against the indictment.

In the *Billings* opinion (*supra*) it was said that the fact that one may have been accepted several weeks before he was ordered to report for induction would not alter the case. The fact that each petitioner may have been accepted several weeks before he was ordered to report for work of national importance did not change the fact that he was actually accepted for work of national importance in a CPS camp. The final irrepealable order of General Hershey assigning him to do work of national importance had been theretofore issued. In *Billings* v. *Truesdell, supra,* it is said: "It is difficult to see why there would be a difference in result if the interval between the time when he is found acceptable or is accepted and the ceremony of induction were only a few minutes, as in the present case, rather than a few weeks." It is only administrative remedies that one is required to exhaust in order to qualify himself for judicial review.

No administrative remedy was available to petitioners upon reporting to the camps. Dodez could not have been discharged at the camp. His acceptance on reporting at the camp, had he reported, would have been mandatory. This is demonstrated in the case of Gibson. Gibson reported at the camp, was accepted at the camp when the camp director completed the "Order to Report for Work of National Importance" and the "Report of Physical Examination and Induction".* The fact that Gibson was commanded to re-

* The parties hereto have stipulated that Gibson was accepted at the camp on August 23, 1944, when he reported there. The stipulation has been filed with the Clerk of this Court. This should make unnecessary a discussion of this question upon the oral argument, which the Court indicated in its order that it desired discussed by counsel on reargument.

main at the camp shows that he had no remedies available to him at the camp.

Section 652.13 of the Regulations provides that the registrant is under the jurisdiction of the camp after leaving his board, following his reporting at the board to be transported to the camp. Section 653.11 (a) requires the director, on arrival of the registrant at the camp, to fill out the order to report for work of national importance. Section 653.11 (c) of the Regulations declares that acceptance at the camp is completed by filling out the order to report. Section 653.11 (b) provides for a cursory physical examination, but inasmuch as Section 653.11 (c) provides that acceptance shall be made irrespective of the physical examination, it is impossible for a registrant to be rejected at the camp.

It would be a hollow formalism to hold that it was necessary for petitioners to report for work of national importance and to appear at the camps for the mere purpose of having the camp directors fill out forms showing that they had been accepted, when they had been previously accepted upon the preinduction physical examination which exhausted the administrative remedies, and when there was no possibility for petitioners to get any relief by being rejected. Indeed, Section 653.12 of the Regulations makes it a mandatory duty for a registrant to remain at the camp after reporting there.

In view of the position which is here taken as to when the administrative remedies are exhausted, in which the Government concurs, it is highly necessary to call upon this Court to reconsider and overrule its decision in *Falbo* v. *United States*, 320 U. S. 549. If Dodez and Gibson had completed the selective process when they were accepted upon the preinduction physical examination so as to exhaust the administrative remedies, then Falbo had also completed the selective process and had exhausted his administrative remedies when he was accepted by the armed

forces upon his final-type (preinduction) physical examination. The Regulations with respect to acceptance and assignment to a civilian public service camp, following a preinduction physical examination, are identical with the Regulations about acceptance and assignment following the final-type physical examination that were considered in the *Falbo* case. If the administrative remedies have been exhausted in the *Dodez* and *Gibson* cases, they were also exhausted in the *Falbo* case. If Dodez and Gibson are entitled to challenge the jurisdiction of the administrative ageney, then Falbo was qualified to challenge the jurisdiction of the administrative agency in response to the indictment under which he was convicted in his case.

At the time Falbo was ordered to report for work of national importance, Section 651.2 of the Regulations provided for the issuance of an Order to Report for Final-type Physical Examination to registrants classified in Class IV-E. Section 629.2 (c) of the Regulations now provides that a IV-E registrant shall be ordered "to report for preinduction physical examination under the provisions of paragraph (b) of this section."

The Regulations at the time Falbo was ordered to report provided for registrants placed in Class IV-E to report to the army induction station for a final-type physical examination, "along with the selected men who are being delivered to the induction station". Reg. 651.7 (b). Section 629.21 of the present Regulations provides that "When the local board mails to a registrant an Order to Report —Preinduction Physical Examination (Form 215), it shall be the duty of the registrant to report for such examination at the time and placed fixed in such order".

The Regulations at the time Falbo was ordered to report provided for a final-type physical examination at the induction station identical with the present preinduction physical examination. (Reg. 651.8) The present preinduc-

tion physical examination provided for in the Regulations is in every respect the same as the final-type physical examination given to Falbo. (Reg. 629.2)

After a registrant Classified IV-E was given the final-type physical examination at the time Falbo was ordered to report, a Report of Physical Examination and Induction was returned to the local board by the induction station commander, which showed that the registrant was qualified or disqualified for service. (Reg. 651.9) Under the present Regulations after each IV-E registrant has undergone the preinduction physical examination, the commanding officer returns to the local board the Report of Physical Examination and Induction showing whether or not the registrant is physically or mentally acceptable for training and service. (Reg. 629.31)

At the time Falbo was ordered to report, the Regulations provided that "When a registrant in Class IV-E has been found to be acceptable for work of national importance" upon the final-type physical examination, the local board was required to notify the Director of Selective Service that the registrant was "so acceptable" and "available for assignment to work of national importance under civilian direction." (Reg. 652.1 (a)) The Regulations at the present time provide that after the IV-E registrant has been accepted upon the preinduction physical examination the local board shall notify the Director of Selective Service that "the registrant is available for assignment to work of national importance under civilian direction." Reg. 652.1(a).

The Regulations at the time Falbo was ordered to report, with respect to *assignment* of a registrant classified IV-E to do work of national importance in a civilian public service camp designated by the Director of Selective Service, are identically the same in every respect with the present Regulations.

At the time Falbo was ordered to report, the Regulations with respect to the preparation and mailing of the Order to Report for Work of National Importance are substantially the same as the present Regulations on that subject. (Reg. 652.11)

Since taking of the preinduction physical examination now terminates the selective process of IV-E registrants, it must be conceded that the taking of the final-type physical examination by Falbo—which is identical to the preinduction physical examination—exhausted his administrative remedies and he was also in a position to challenge the administrative order as a defense in response to the indictment. There was no other remedy available which can be considered an administrative remedy for the purpose of complying with the doctrine of exhaustion of administrative remedies. Such further step of reporting needed not be complied with by him as a condition precedent to judicial review. *Utley* v. *St. Petersburg,* 292 U. S. 106; *Kansas City S. Ry.* v. *Ogden Levee Dist.* (CCA-8) 15 F. 2d 637. See also *Gonzales* v. *Williams,* 192 U. S. 1, 15, where, with reference to an argument about exhausting administrative remedies, the court said: "She was not obliged to resort to the superintendent or the secretary."

The Government argues that when Gibson and Dodez were ordered to report the reception of a conscientious objector at the civilian public service camp differed from that which prevailed at the time that Falbo was ordered to report. The Government says that at such time it was possible for a registrant to be rejected upon an examination at the camp. As a basis for this contention, rather than citing or quoting the Regulations as they existed at the time Falbo was ordered to report, the Government relies upon a portion of the language of this Court's opinion in *Falbo* v. *United States, supra,* which was the result of the Government's unfair presentation of the law in that case. The language is: "The selectee may still be rejected at the in-

duction center and the conscientious objector who is opposed to noncombatant duty *may be rejected at the civilian public service camp.*" (Emphasis added) 320 U. S. at p. 553.

The Regulations at the time Falbo was ordered to report for work of national importance did not provide for the rejection of an assignee found to be physically fit. The Regulations provided that "*If* the assignee indicates that his *physical condition* has *changed since* his final-type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary." (Emphasis added) Reg. 653.11 (c); Brief for the United States, *Falbo* v. *United States,* No. 73 October Term 1943, pp. 113-114.

It is manifest that the Court, in the *Falbo* case, misapprehended the effect of this Regulation. To begin with, the examination provided for in the Regulation on its face is contingent upon a change in the physical condition. Unless the registrant indicated that there had been a change in his physical examination since the final-type physical examination, there was no opportunity for the camp physician to examine him, because his acceptability had been predetermined upon the final-type examination. (Reg. 653.11 (c)) Therefore when this Court held that it was possible for the conscientious objector to be rejected at the civilian public service camp as an administrative remedy it violently assumed that there would be a change in the physical condition of every selectee warranting another examination.

Certainly the exhaustion of administrative remedies does not depend upon the vagaries of a man's physical condition. Once a condition is proven, it is presumed to continue to exist. Of course, a registrant could be struck by lightning, develop galloping tuberculosis or have an acci-

dent and otherwise become unfit for service from the time he was accepted upon the final-type examination until the time he reported at the camp. But certainly the uncertain right to a physical examination in any one of such vague and indefinite contingencies cannot be urged or asserted as constituting an *administrative* remedy. Therefore, when this Court held that there was an opportunity for every assignee to be re-examined at the camp as an administrative remedy it erred.

Regulation 653.11 (c) provided that, upon such physical examination, which was given only in the event the registrant indicated a change in his physical condition, the assignee thus reporting physical defects may not be accepted for work of national importance. (Reg. 653.11 (c)) However, that Regulation specifically failed to provide for a rejection of the assignee from camp. The Regulation specifically provided that "the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized, where necessary." (Reg. 653.11 (c))

The provision in the Regulations, at the time that Falbo was ordered to report, for the right to have a physical examination upon reporting at the camp, in the event only that the registrant indicated a change in his physical condition, certainly cannot be said to constitute an *administrative remedy* available to every registrant ordered to report for work of national importance. If so, then the Court would have to impute that every registrant classified in IV-E probably would have a "break-down" in his physical condition from the time he was given the final-type physical examination to the date he reported at the camp, though it might be a period of only a matter of days or weeks.

The administrative remedy provided in the Regulations for the examination of only registrants who, upon reporting at the camp, indicated a change in physical condi-

tion, is nothing more than a provision (similar to the familiar rule in administrative law) for a motion for rehearing where there has been a change in the circumstances or facts after the date of the original administrative decision. In other words, the provision for an examination at the camp was nothing more than an optional "rehearing" or optional "reexamination" because of the change in the physical condition subsequent to the final-type examination.

This Court has unanimously held that where there is an optional rehearing available to a party in administrative law, it is not necessary for him to resort to exercise of his option of filing a motion for rehearing as a condition to judicial review of an administrative determination. *Levers* v. *Anderson*, 326 U. S. 219.

The argument of the Government that there is a difference between the Regulations with respect to the procedure upon acceptance at the civilian public service camps when Falbo was ordered to report and when Gibson and Dodez were ordered to report is specious and wholly immaterial because the difference in the Regulations is confined only to assignees who showed a change in physical condition from the date of the final-type examination to the date they reported at the camp. There are no differences in reference to examination of those who did not indicate a change of physical condition. At the time Falbo was ordered to report there was no general provision in the Regulations whereby *every* assignee was given a complete final-type *re*examination. At the present time there is no provision in the Regulations for such *re*examination for *every* assignee. The elimination of that portion of the Regulations allowing assignees who indicated a change in physical condition to require reexamination at the camp is wholly immaterial.

The Regulation in respect to reception of every assignee *who did not indicate a change in physical condition*

is identically the same now as it was at the time Falbo was ordered to report. Therefore, when the Government argues that assignees could be rejected upon examination at the camp, it misapprehends and misinterprets the Regulations to this Court.

The Government made it appear to this Court that every assignee reporting at a civilian public service camp was given a complete reexamination physically. This is not according to the facts. The right of a *very* few of the assignees, reporting a change in physical condition, to a complete reexamination certainly cannot be held to constitute an administrative remedy to *every* assignee who had been declared acceptable upon the final-type physical examination. Since it is obvious that the right of some assignees, who reported a change in physical condition, to a reexamination does not constitute an administrative remedy to all of such assignees—all accepted assignees—it cannot be said to be an administrative remedy that must be resorted to by all assignees as a condition precedent to challenge the administrative action.

Therefore for the purpose of determining whether or not there is an administrative remedy, it must be said that the Regulations as they exist now, as they existed at the time Dodez and Gibson were ordered to report, and as they existed at the time Falbo was ordered to report, are identical in that they provide for completion of the selective process at the same point. They *do not* provide for an *administrative remedy* to every assignee against a final order of the administrative agency by reporting to the camp.

Since there is no difference between the Regulations from that standpoint, it must be said that the *Dodez* case is identical with the *Falbo* case in every respect and therefore this Court should reconsider its decision in the *Falbo* case,* overrule the *Falbo* decision, declare that the case was erroneously decided, and set aside the doctrine therein announced.

TWO

Gibson's reporting at the civilian public service camp as ordered and leaving it immediately after acceptance and physical examination did not constitute a waiver of his right to challenge the jurisdiction of the Selective Service System in his defense against the indictment.

Under the Regulations Gibson could not be rejected upon his reporting at the civilian public service camp. Even if the physical examination at the camp had disclosed that he was physically unfit for training and service, he would not have been discharged. The Regulations provided that he would be accepted regardless of the outcome of the physical examination. (Reg. 653.11) As a matter of fact, he was accepted at the camp on August 23, 1944, the day on which he arrived at the camp, when the acting camp director filled out the Report of Physical Examination and Induction (Form 221) forwarded by the local board to the camp, as required by Regulation 653.11 (c). This was several days before he was examined by the camp physician. However, he remained at the camp until he had the physical examination, for which he had come to the camp in the belief that

* Attention of the Court is again directed to the fact that this same argument was urged upon the Court in the Second Petition for Rehearing filed in *Falbo* v. *United States*, No. 73 October Term 1943, pages 10-27, overruled 322 U. S. 770. This same question was presented to this Court in *Grieme* v. *United States*, No. 883 October Term 1943, Petition for Writ of Certiorari, pages 9-13, certiorari denied, 322 U. S. 744.

it was necessary in order to exhaust his administrative remedies, which examination was given him pursuant to Regulation 653.11 (b).

The undisputed evidence shows that Gibson did not go to the camp for the purpose of performing work of national importance. Indeed, the evidence shows without contradiction that he refused to perform any work whatever from the time he got there until he left. The only reason he remained at the camp was because he was awaiting the return of the camp physician. He thought it was his duty to stay at the camp until he had been examined by the camp physician. Gibson believed, based on the legal advice in this Court's decision in the *Falbo* case, that he could not exhaust his administrative remedies until he had submitted to the physical examination for the purpose of finalizing his acceptance. While it may be conceded that he was in error as to where the line was drawn or to what point he had to go in order to exhaust his remedies, yet it must be conceded that he reported at the camp for the sole purpose of exhausting his remedies. After his physical examination, following his acceptance at the camp, he gave the camp director a letter showing why he had reported. The letter proved that he reported at the camp for the sole purpose of taking the physical examination and leaving because he claimed that the Selective Service System had no jurisdiction to order him to report for work of national importance or command him to remain at the camp. [70-71] Indeed, it must be conceded that the undisputed evidence establishes that Gibson in good faith believed that he was required to go to the camp for those purposes. It cannot be contended that he went for an evil or wicked purpose. He did not go to the camp for the sole purpose of defying the law.

He had reasonable grounds to believe that it was necessary to report to the camp and there undergo a physical examination. The decision of this Court in the *Falbo* case

was not clear as to where the line was drawn. Indeed, until this Court decided the case of *Estep* v. *United States*, 66 S. Ct. 423, even the Government stubbornly contended that the line was not reached until the assignee reported for work of national importance, there remained at the camp, and applied for a writ of *habeas corpus*.

In this contention about what the law was the Government erred. Gibson should not be charged with knowing more law than the Government. This is especially true in view of the fact that this Court did not make plain its interpretation of the Regulations in the *Falbo* case.

A comparison of the Regulations, as they existed at the time Falbo was ordered to report, with the Regulations as they existed when Gibson was ordered to report shows that they were not different in respect to the right of every assignee ordered to report to have a physical examination upon reporting to the camp, which could result in his rejection. The Regulations provided that the physical examination was given *only* in event that the assignee *indicated a change* in his physical condition since the final-type physical examination. This was at the time Falbo was ordered to report.

Under such circumstances there was no provision for a healthy assignee, who had experienced no change in physical condition, to get an examination upon reporting at the camp. Accordingly, the Regulations did not provide for examination in all cases or as a regular procedure for all assignees reporting at the camps.

The fact that the Regulations, at the time Gibson was ordered to report, did not provide for an examination did not change the situation. A healthy assignee had no more opportunity to exhaust an administrative remedy by a physical examination at the time Falbo was ordered to report than he did at the time Gibson was ordered to report. It must be presumed that, at the time Falbo was involved,

once an assignee was accepted upon a final-type physical examination by the armed forces under the Regulations his acceptance would continue up to and including the time he was ordered to report, unless, of course, he had been severely injured, developed a chronic and devastating disease or had suffered some other catastrophe.

Certainly no reasonable person reading the Regulations as they existed then, or now, could claim that there is any substantial difference insofar as exhaustion of administrative remedies is concerned. There were no administrative remedies then. There were none when Gibson reported. Accordingly when this Court indicated that it was necessary for one to report at the civilian public service camp and undergo the physical examination as a condition precedent to obtaining judicial review, every reasonable assignee had the right to rely upon the logical inferences to be drawn from the language of, and the decision in, the *Falbo* case. Therefore Gibson was acting upon a command that was implicit in the *Falbo* decision which required him to go to the camp. The failure of the Court to clarify what it meant in the *Falbo* decision cannot be employed now as a *trap* in which to ensnare an assignee who was vainly trying to protect himself against the lawlessness of the administrative agency assuming jurisdiction over him contrary to an express exemption. The Act stated that Gibson, a minister of religion, was not subject to the jurisdiction of the administrative agency.

It would be especially harsh to hold that Gibson waived his rights when there was no showing that he knew where the actual legal line of exhaustion of administrative remedies was drawn. There was no ceremony to indicate where he changed his status from that of an assignee to a campee. There was no act Gibson was required to voluntarily do which indicated to him and the whole world that he was giving up his exempt status. In the absence of an induction ceremony, as in case of selectees for the armed forces, or

of evidence explicitly showing that Gibson intended to waive his rights under the law, there can be no presumption that his act constituted a waiver of his legal rights. *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

It does not appear that Gibson had full knowledge as to where the dividing line was, especially in view of the holding of this Court in the *Falbo* case that the final-type physical examination did not constitute an exhaustion of the administrative remedies. It cannot be said that Gibson had full knowledge of what *in the future* the law *would be declared* to be. Unless it can be shown that he was aware of the consequences of his action and what this court will *now* decide in these cases it cannot be said that he waived his rights. It was impossible for Gibson to know where the dividing line was at the time he reported. Even the Government did not know where the dividing line was at that time, arguing that habeas corpus after induction or reporting was the only remedy. There was confusion in the law resulting from a failure of this Court to be more explicit in its opinion in the *Falbo* case. Under the circumstances Gibson did not waive his rights to challenge the want of jurisdiction on the part of the administrative agency in spite of his going "too far" as contended by the Government. *Pence* v. *Langdon*, 99 U. S. 578, 581; *Provident Life Ins. Co.* v. *Hawley* (CCA-4) 123 F. 2d 479, 482; *Keehn* v. *Excess Ins. Co. of America* (CCA-7) 129 F. 2d 503, 506.

The very most that the situation can be likened to is that of instances where a fine is paid under protest. In such instances it has been uniformly held that there is no waiver of the rights to challenge the imposition of the fine. *Hartwell* v. *United States* (CCA-5) 107 F. 2d 359, 360; *United States* v. *Daschiel*, 3 Wall. 688, 697-702.

In view of the confusion in the law as to where the line is drawn, and since the *Falbo* decision impliedly commanded Gibson to report at the civilian public service camp, it would be wholly unfair to use it as a *trap* in which to en-

snare Gibson and deprive him of his rights under the Act and Regulations.

It will be conceded by the Government that in cases where one reports at the camp and applies for a writ of *habeas corpus* he does not waive his right to challenge the want of jurisdiction of the administrative agency. If one who reports at the camp and there remains, applying for a writ of habeas corpus challenging jurisdiction of the camp, does not waive his rights, of necessity one who reports and refuses to stay should not be waiving his rights.

If a camp does not have jurisdiction to hold an *exempt* registrant applying for a writ of *habeas corpus*, then by force of the same reason a camp would not have jurisdiction under the Act and Regulations sufficient to invoke the criminal process against an "escaped" campee who walked off in violation of the Regulations. Regardless of whether the jurisdiction of the district court is invoked by the Selective Service System to enforce the authority of the camp, or the court is appealed to through *habeas corpus* to break the claims of authority made by the camp, the district court has authority to inquire into the want of jurisdiction and lack of authority of the Selective Service System.

There is no logical reason or clear ground that can be asserted to assume that Congress intended to deprive one who walked off from a camp, after reporting to exhaust his administrative remedies, of his right to challenge the authority of the administrative agency. It is necessary to have some explicit provision in the Act to warrant such a strained and discriminatory conclusion. Certainly Congress did not intend that one charged with a violation of the Regulations by refusing to remain at a camp, after reporting in belief it was necessary to exhaust his administrative remedies, has less rights to protect himself in the courts against an indictment brought for the purpose of sending him to prison under the Act than are accorded to one who wholly refused to report for work of national importance

altogether. To so hold would indeed make a *trap* which would subject those who in good faith went beyond the line marked by the Regulations as a termination of the selective process, and in the honest belief that they were exhausting their administrative remedies, to more severe penalties than those who stayed away altogether in defiance of the board's order to report. *Billings* v. *Truesdell,* 321 U. S. 542, 558-559.

There is no rule of "going too far" in an effort to exhaust one's administrative remedies. Certainly a party to an administrative proceeding would not waive his rights by filing repeated motions for rehearing which are not authorized by the Regulations. The generosity of one in going beyond that which is required by law to exhaust his administrative remedies does not harm the Government.

There is no reason for the new "rule of law" which the government attempts to graft onto the body of administrative law that one can go "too far". The proposed new rule of going "too far" advocated by the Government finds no support whatever in reason or justice.

There is a reason for the rule of law which requires one to exhaust his administrative remedies. The courts are not desirous of taking on a controversy prematurely. The courts want parties subject to administrative acts to exhaust every possible effort to settle their disputes in the agency before appealing to the courts for relief. The rule of exhaustion of administrative remedies is merely a rule of expediency. It is a rule of reason. *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41. But certainly it cannot be said that because one does more than what the law requires (in an effort to obtain administrative relief before precipitating the administrative controversy into the courts) he should be penalized. Indeed, an effort to "re-exhaust" administrative remedies tends to reduce litigation rather than foment it, which a premature appeal to

the courts from administrative action does. Avoidance of the latter is the aim of the rule requiring the exhaustion of administrative remedies.

It has long been uniformly held that where one is assailed by an indictment or proceeding in court he can defend and "The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the right principles of the social compact and of the right administration of justice." *McVeigh* v. *United States*, 11 Wall. 259, 267.

The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 274, 277-278. There it was said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common inteiligence and conscience of all nations."

It is the duty of this Court to give to the statute a reasonable interpretation. The interpretation given by the Government is wholly unreasonable, in addition to being unsupported by any valid reason. It is unreasonable to suppose that Congress would authorize the Government to proceed against a defendant under the Act and at the same time cut out his defenses as the Government here argues. A reasonable construction requires that this Court impute no such evil intent to Congress. On the contrary, it must be supposed that Congress intended that every defendant prosecuted under the Act would have a fair trial and full hearing.

It is a rule of long standing, established by this Court, that all reasonable doubts concerning the meaning of a statute should operate in favor of the rights of the defendant. In *Harrison* v. *Vose*, 50 U. S. 372, at page 378, this Court said: "In the construction of a penal statute it is

well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. In *United States* v. *Shackford*, 5 Mason 445, Justice Story says: 'It would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet for penalties' (p. 450)." Also, in *United States* v. *Kirby*, 7 Wall. 482, at pages 486-487, the Court observed: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of the character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."

Petitioner is therefore in exactly the same position as though he were before the court upon a petition for writ of *habeas corpus*. The only difference is the method in which the question is presented to the court. In a *habeas corpus* proceeding the question would be presented upon an affirmative move initiated by Gibson, who would request the court to pass upon the validity of the order to report. Here the civilian public service camp has invoked the order to report for work at the camp as ground for its jurisdiction, and by affirmative move requests the court to find that petitioner has defied that jurisdiction. The question for the court to decide is whether one illegally classified, ordered to do work of national importance and who reports, must remain at the camp and then apply for a writ of *habeas corpus* as the only remedy.

Stated another way: The court must decide whether one who has exhausted his administrative remedies may be denied his right to challenge the validity of the order upon which an indictment is based, charging him with vio-

lating the Act for failure to remain at the camp and do work of national importance after having completed his administrative remedies.

The Government through syllogism reaches the conclusion that Gibson is in the same posture as Smith and Estep* would have been had they submitted to induction and then deserted from the armed forces. It should be observed that the United States Circuit Court of Appeals for the Eighth Circuit held, in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, that the invalidity of the administrative action could be challenged by a deserter who had been court-martialed in spite of his defiance of the orders of the administrative agency and of the armed forces. The Government cites district court decisions holding, under the 1917 Act, that deserters could not challenge the validity of draft board determinations and the validity of court-martial proceedings resulting from their desertion. (*Ex parte Romano*, 251 F. 762, 764 (D. Mass.); *Ex parte Tinkoff*, 254 F. 912 (D. Mass.); *Ex parte Kerekes*, 274 F. 870 (E. D. Mich.))

This analogy is specious and not apposite, for several reasons. In the first place, there is no induction ceremony or other formality that an assignee is required to undergo before attaining the status of a full-fledged campee. No line is drawn to warn the assignee that he is about to assume a status imposing additional obligations. In the case of a man ordered to report for induction into the armed forces appropriate ceremony is prescribed, affording him opportunity to choose between acceptance of military service or prosecution in the civil court. A campee is and always remains a civilian. He has no opportunity to choose between the status of an assignee and defending his cause in the civil court. The law requires him to report at the camp in order to do work of national importance under civilian direction. (Reg. 652.11, 653.12) Concededly, since there is no

* Petitioners involved in *Estep* v. *United States*, 66 S. Ct. 423.

opportunity to make the choice, it cannot be said that a minister who is attempting to exhaust his administrative remedies by completing the selective process has waived his right to challenge the legality of the administrative action.

The Government contends that it is the unqualified duty of each registrant classified as a conscientious objector to report at a civilian public service camp and there remain until administratively released or judicially released by *habeas corpus*. The Government makes no distinction between registrants liable for the performance of work of national importance and those expressly exempted by Congress from training and service. The Government's argument may be applicable to a person liable for training and service. However, the Government's theory is not applicable to any who are specifically exempted from training and service. It is within the discretion of the Selective Service Director to defer certain persons liable for training and service, or allocate them to perform service elsewhere than in the armed forces. Such persons do not have the same rights as registrants expressly exempted by Congress from training and service. These two types of registrants should not be confused one with the other. It is not a question of the propriety of the classification made within the authority of the classifying agency if an exempt registrant is ordered to report for work of national importance. In such a situation it is rather a question of want of jurisdiction, lack of authority, or *ultra vires* action, on the part of the administrative agency. In such an instance of illegal action, the order is not voidable but is wholly and inherently void.

Even though an exempt registrant should report to a civilian public service camp for the purpose of exhausting his remedies and thereby subject himself to the custody of the director of the camp, this does not confer jurisdiction

upon the camp director. The order to report for induction being void for want of jurisdiction on the part of the board, *a fortiori,* the alleged jurisdiction of the camp director is likewise void for the same reason.

The order of an executive agency commanding a person exempt from military duty to submit to the performance of duty is void for want of jurisdiction. It follows that the orders of a draft board and of a camp director based upon the decision that an exempt person is liable for training and service is "clearly without jurisdiction, cannot protect the officer who executes" them. *Wise* v. *Withers,* 3 Cranch 331, 336.

The rule of the cases alluded to by the Government is confined to instances where the process defied is issued by a tribunal having jurisdiction. Inasmuch as the rule advocated by the Government is confined to process merely voidable rather than void, the analogy does not apply to the conduct of a minister exempt by act of Congress in leaving a civilian public service camp that does not have jurisdiction over him because of the *ultra vires* action of his local board. In this instance the order given Gibson by the draft boards was void rather than voidable, for want of jurisdiction of the local board. Indeed, the draft boards and all persons acting under their direction in assuming jurisdiction over Gibson are liable to Gibson for damages in a tort action at law.* Therefore the cases relied upon by the Government in instances where there has been defiance of a warrant for arrest or escape from a penal institution are wholly inapposite here. Moreover, the line of district court decisions in which it has been held that a deserter could not challenge his classification under the 1917 Act because of his defiance of the authority and taking the

* *Miller* v. *Horton,* 152 Mass. 540; *Pearson* v. *Zehr,* 138 Ill. 48; *Manning* v. *Ketcham* (CCA-6) 58 F. 2d 948; *Wise* v. *Withers,* 3 Cranch 331, 336. See, also, Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927, Harvard University Press, Cambridge, Mass.) pages 44-45, 307-308.

law into his own hands, did not involve situations where the registrant was entirely exempt from all training and service under the Act. Furthermore, these decisions are materially weakened by the decisions of the Circuit Court of Appeals in *Ver Mehren* v. *Sirmyer* (CCA-8) 36 F. 2d 876, with which they conflict.

Another position of the Government is that by reporting at and leaving the camp after having exhausted his administrative remedies upon the preinduction physical examination, Gibson defied the law and compelled the administrative authority to invoke the criminal sanctions clause of the Selective Training and Service Act against him. The Government says that Gibson "cannot test in that way the validity of the orders as applied to him." (*Hirabayashi* v. *United States*, 320 U. S. 81, 109; *Giese* v. *United States* (App. D. C.) 143 F. 2d 633, 635, affirmed, *per curiam*, by an equally divided court, 323 U. S. 682. (See "Memorandum for the United States in opposition to the granting of petition for writ of certiorari" in the *Gibson* case, pp. 8, 10.)

Moreover, the Government says that the course taken by Gibson is similar to that of a prisoner in a penal institution who has illegally escaped from custody and who, on being prosecuted for jail-breaking, is denied a defense to such prosecution on the ground that his sentence was irregular or voidable. The Government relies upon three cases.*

The Government's assertion that the *Hirabayashi* decision is apposite here is spurious. The argument is wholly factitious. The question involved there was whether the curfew order was an unconstitutional delegation of author-

* Memorandum in opposition to petition for writ of certiorari, p. 10: "Similarly, a prisoner in a penal institution cannot justify his escape because he is confined under an irregular or voidable sentence; despite the illegality of his imprisonment, he has committed a criminal offense. *Bayless* v. *United States*, 141 F. 2d 578 (CCA-9), certiorari denied, 322 U. S. 748; *United States* v. *Jerome*, 130 F. 2d 514, 519, certiorari denied as to this point, 317 U. S. 606; *Aderhold* v. *Soileau*, 67 F. 2d 259 (CCA-5). For other examples of situations in which, 'even in peacetime, the duty of the citizen to cooperate in effective law enforcement overrides his convenience,' see *Giese* v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed, *per curiam*, by an equally divided court, 323 U. S. 682."

ity and discriminatory. The validity of the exclusion order was not determined. The orders were made on a race or group basis. In that case there was no provision for individual demonstrative determinations. The law did not contemplate individual classifications. There was no provision for exhaustion of administrative remedies. There was nothing said in the Act or the order about administrative determinations respecting loyal citizens as compared with disloyal citizens of Japanese ancestry. It can be assumed that if the law or orders involved in the *Hirabayashi* case provided for exemption of loyal Japanese, or provided for administrative determinations upon an individual basis as a condition precedent to invoking an exclusion order, then an inquiry thereof would have been permitted in a defense to an indictment of one charged with defying the exclusion order.

Even in the absence of an administrative determination on an individual basis, it must be assumed that if the Army did not have jurisdiction and authority over the particular individual or class of individuals, the person thus claiming want of authority could assert it in defense to an indictment based on his alleged defiance of the order. Suppose, in the *Hirabayashi* case that Hirabayashi were a Filipino or a Chinese who had been mistakenly included in the curfew order or the evacuation order. It must be conceded that in such circumstance Hirabayashi, if a Chinese or Filipino (neither of which nationals was within the scope of the order), could prove his nationality and show that the order was *ultra vires* and in excess of the jurisdiction asserted by the armed forces. That is precisely the situation presented here. It would be a violation of due process to compel one not subject to administrative action to comply with it in order to question the want of authority of the administrative agency.

In the *Hirabayashi* case the defendant actually defied the curfew order and the evacuation order. Nevertheless

this court considered his defense that the curfew order was void. In that case the Government did not contend that the defendant was not entitled to raise and the court was not entitled to consider the defenses urged because he had not complied with the order. If a defense as to the *constitutionality* of a particular order can be considered on the ground that it involves a determination of the constitutionality of the curfew order, then with equal force of reason the *courts* can also construe the order or statute and consider whether the particular order is applicable to the facts or is illegal because contrary to the statute authorizing it, in that the person affected is *exempt* or the administrative agency *did not have jurisdiction,* without requiring that he comply with the order. It seems plain that if an order of an administrative agency is legal it should not and can not be flouted; but that if an order of such agency is illegal and void, then as a matter of fact it cannot place any citizen under an obligation to do anything. If the citizen chooses to ignore an invalid, unlawful order, no one would contend that he would be prevented from setting up this fatal defect in any subsequent prosecution that might be instituted against him.

The analogy between the action of Gibson and that of an escaped convict is wholly factitious and syllogistic. It is based upon an assumption of fact that does not exist. Like a house built upon a foundation of sand, it appears to be apposite. Yet when subjected to the turbulent waters of truth, the foundation melts away and the structure of the argument collapses. In the case of an escaped convict charged with jail-breaking, the prosecution is not based upon the judgment and commitment that placed him in custody. The commitment is wholly collateral. The jail-breaking is incidental to the original judgment. Prosecution for jail-breaking is based upon a statute specifically prohibiting jail-breaking. Prosecution in the instant case is directly

based upon alleged defiance of an administrative order which is directly challenged in the proceedings.

In the *Gibson* case the administrative authority has been directly invoked by the civilian public service camp in delinquency proceedings through indictment charging Gibson with a violation of the administrative order. Gibson says that the administrative order is void for want of jurisdiction of the camp and of an administrative agency. He says that the order is *ultra vires* and that it is wholly void. It is more than voidable. When the supposed analogy claimed by the Government between the act of Gibson and that of an escaped convict is subjected to this test, it disappears as an illusion.

In cases involving prosecutions for prison breaks the prisoner is confined because of his violation of the law. In the case at bar *Gibson* was confined at a civilian public service camp because this court in the *Falbo* case ruled that he had to go there to exhaust his administrative remedies, on account of the violation of the law by the administrative agency. Since the board had no jurisdiction because he was exempt as a minister of religion from all training and service under the Act, the camp had no jurisdiction. This can be shown in actions instituted under Section 11 of the Act to enforce the orders of the administrative agency.

The proceedings in the *Gibson* case are more nearly analogous to contempt proceedings based upon defiance of the order of court than the Government's "escaped convict" simile. The decision styled *In re Burrus* (136 U. S. 586) held that one who defied the order of a court could challenge the validity of the order on the grounds of want of authority, *ultra vires*, or excess of jurisdiction to make the order. See also *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

It is indeed unfair to deny a minister of religion, who has attempted to protect his rights under the act, his right

to challenge the legality of the administrative action because he went *'too far'* when he reported in good faith in an attempt to complete the selective process as suggested by this court in the *Falbo* and *Billings* decisions. The Government says that the petitioner assumed the risk of following such suggested course of action. The Government would have this court treat petitioner much worse than a man treats his dog. The dog, unaware of the law made for him in the chambers of his master's mind, does not know he has made a mistake until he is whipped by his master. But even a dog is not punished when he does what he is told to do.* Here, however, the Government would have the court punish Gibson for doing what this court impliedly, if not expressly, suggested in the *Falbo* and *Billings* decisions. Gibson respectfully asks, Is not the Government asking the Court to go *'too far'?* Will compliance with the Government's request be "equal justice under law"?

*"Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk: common law by its very essence. It is the Judges (as we have seen) that make the common law:—Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way Judges make law for you and me. They won't tell a man before hand what it is he *should not do*, they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."—TRUTH in Jeremy Bentham's *Truth* versus *Ashhurst* (London, December 17, 1792; printed in 1823 by T. Moses, 30, Wilderness Row, London, England.)

THREE

The construction placed upon the Act and Regulations by the courts below denies petitioners their right to challenge the jurisdiction of the draft boards and the legality of the orders supporting the authority of the civilian public service camps in violation of due process of law, contrary to the Fifth Amendment to the United States Constitution, and denies them a judicial trial contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution.

Since it is conceded that each petitioner reached the point where his administrative remedies had been exhausted, it must be concluded that each was qualified for judicial review of the administrative action as a defense against each indictment. The undisputed evidence and the record show that this right was denied each petitioner.

If the Act and Regulations, as applied in these cases, are to be construed so as to deny one the right to a judicial review of the administrative action in response to the indictment, then such construction and denial is contrary to the due process clause of the Fifth Amendment to the United States Constitution. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *Estep* v. *United States,* 66 S. Ct. 423, 429-433, concurring opinion of Mr. Justice Murphy.

Moreover, to deny Gibson his right to be heard in his defenses in response to the indictment because he is charged by the Government with going "too far" is an arbitrary and

capricious denial of a judicial trial. If the Act and Regulations be construed to sustain such an abridgment of the right to a judicial trial, then such construction transforms the Act and Regulations into a Bill of Attainder, contrary to Clause 3, Section 9 of Article I, and Article III of the United States Constitution. *Cummings* v. *Missouri,* 4 Wall. 277, 320-332; *United States* v. *Lovett,* No. 809, October Term 1945, 14 L. W. 4399, 66 S. Ct. 1073, decided June 3, 1946; *Kentucky* v. *Jones,* 10 Bush. (70 Ky.) 725.

The argument of the Government that alleged violators of the Act, such as petitioners here, cannot challenge those orders in defense to an indictment and that the only remedy one has is to remain in camp and apply for a writ of *habeas corpus,* requires the Court to place an unreasonable and unconstitutional construction upon the Act. Additionally, it raises "a succession of constitutional doubts as to such interpretation." (*Harrison* v. *Interstate Commerce Commission,* 211 U. S. 407, 422) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Kirby,* 7 Wall. 482, 486-487; *United States* v. *American Trucking Ass'n,* 310 U. S. 534.*

* The unconstitutionality of the Act as construed and applied in this manner was exhaustively argued to this Court in *Smith* v. *United States,* No. 66 October Term 1945 and *Estep* v. *United States,* No 292 October Term 1945, in joint brief for petitioners at pages 85-105. For further and more exhaustive argument on this proposition, the Court is here and now referred to that argument in such brief.

FOUR

The holdings of the courts below that petitioners could not challenge the jurisdiction of the draft boards in their trials because they had not resorted to the remedy of *habeas corpus*, were fundamental errors requiring reversal of convictions.

It is not necessary to argue this point exhaustively. Obviously, if these petitioners were denied their right to make a defense that was available under the indictment, petitioners are entitled to a new trial in each of these cases. The Government, of course, will undoubtedly argue that the error on the part of the courts below, in rejecting the evidence and in holding that no defense was available, is harmless error.

A similar effort was attempted by the court of appeals in the case of *Smith* v. *United States*, 148 F. 2d 288. (See the last point discussed in that opinion.) This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. There the trial court failed to pass upon the issue raised. It refused to permit the jury to consider the issue. The questions for determination by the court and jury were limited to whether or not the defendant complied with the order. The same failure to exercise the judicial function is prevalent here. The trial courts did not pass upon the merits of petitioners' defense. If the Government can now argue the merits of the classification given petitioners, then it was also the duty of the trial court in each of these cases to consider the defense. Inasmuch as the trial court did not consider it or permit the jury to consider it, the error cannot be cured by the rationalization of the Government.

The rule announced by this Court in *Estep* v. *United States*, 66 S. Ct. 423, 429, is applicable: "Since the peti-

tioners [Smith and Estep] were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

FIVE

The trial court committed reversible error in excluding the proof offered by Gibson, and in refusing the requested finding of fact and conclusion of law tendering the issue of Gibson's good faith and honest belief that he was exempt from training and service and that the civilian public service camp director had no jurisdiction to command him to remain at the camp.

Upon the trial of his case Gibson offered evidence, in an effort to show his good-faith belief that he was exempt as a minister of religion and that the civilian public service camp had no jurisdiction over him. [48, 73] This evidence was excluded, to which he excepted. [48, 73] In his request for finding and conclusion number 27, Gibson requested the trial court to find and consider whether Gibson in good faith honestly believed that he was exempt as a minister of religion and that the civilian public service camp, therefore, had no right to ask him to remain. [90]*

This proposition is advanced only as an alternative ground for reversal. In event this Court finds that the *Gibson* case should be reversed because of the trial court's refusal to consider whether or not the administrative agency exceeded its jurisdiction, it will be unnecessary for this Court to determine this question. Only in the event that the Court holds that Gibson was not entitled to make his defense in response to the indictment is this proposition advanced. If the Court finds that he went "too far", then,

* The request was not printed as a part of the record in this case. It appears in the typewritten transcript of the record on file with the Clerk, pages 99-100.

under all the facts and circumstances, since he was acting in good faith in an effort to exhaust his administrative remedies by reporting to the civilian public service camp, as this Court indicated in the *Falbo* case that he should do, it seems, at least, that his good faith should have been considered by the trial court in considering whether or not he was guilty. This was not considered by the trial court.

The trial judge, in his rejection of the evidence and by his refusal of the requested finding, held that the honest, good-faith belief of Gibson was not material as a defense to the indictment. To support the proposition that good faith in the *Gibson* case is an issue that should have been considered and that the court erroneously refused to consider, Gibson relies upon *Keegan* v. *United States,* 325 U. S. 478, 493-494; *United States* v. *Murdock,* 290 U. S. 389, 394-396. See also *Okamoto* v. *United States* (CCA-10) 152 F. 2d 905. In the *Murdock* case the defendant was convicted for wilfully and knowingly failing to supply information as to his income. The grounds for the refusal were that he believed that he was exempt on the items inquired about and that the Constitution guaranteed him the right to decline to incriminate himself. This reasonable belief of exemption, which was erroneous, and the fear that he might incriminate himself, entitled the jury to consider that if he had good faith he would not be convicted of wilfully refusing to give the information.

Gibson believed that he had a right to leave the camp after getting his physical examination, and that all required of him was to exhaust his remedies. This reasonable belief based upon the facts of his case, and his reliance upon this Court's legal advice contained in the *Falbo* and *Billings* cases, *supra,* entitled him to have the court consider his good faith in refusing to remain at the camp.

The term "knowingly" as used in the Selective Training and Service Act is synonymous to the word "wilfully".

It does not mean "voluntarily" or "unintentionally". It means prompted by a bad faith or with an evil intent or for an illegal purpose. It means without legal justification. If Gibson had legal justification or reasonable grounds for belief that he was legally justified in leaving the camp, then it cannot be said that he illegally, knowingly, and unlawfully failed to perform a duty required of him under the Act.

The well-known presumption that a person intends the natural consequences of his acts is rebuttable, but a specific intent is an essential element of the offense charged. *Laws v. United States,* 66 F. 2d 870.

If the court were invoking the presumption that men intend the natural and probable consequences of their acts, its rulings were equally in error. The presumption of wrongful intent based on the natural consequences of one's words or acts is not a conclusive presumption but a rebuttable one, and this rebuttal may take the form of testimony by the defendant himself that he intended no such result, and an instruction that accused could not contradict the assumption flowing from his act was held to be reversible error. *Bentall* v. *United States,* 262 F. 744; *Laws* v. *United States,* 66 F. 2d 870. Such a presumption is not applicable in the presence of positive proof that defendant had a different intent. *McDonald* v. *United States,* 9 F. 2d 506; *Blumenthal* v. *United States,* 88 F. 2d 522. A presumption that men intend the natural consequences of their acts is not applicable in the face of affirmative proof that defendant had a different intent. An instruction that if the defendant committed certain acts of violence knowing their effect, intent would be presumed, was held to be reversible error. *McDonald* v. *United States, supra.* It has been authoritatively held that a defendant may by his uncorroborated testimony rebut the presumption that one is presumed to intend the natural and probable consequences of

his act, in fact that it may be "easily" rebutted. *Weiss* v. *United States,* 122 F. 2d 675; cert. den. 314 U. S. 687.

Wilfulness "is something over and above the mere intent to do a thing." *United States* v. *Saglietto,* 41 F. Supp. 21. Where an offense is criminal only when knowingly and wilfully done, it is necessary not only to prove knowledge of the act but to prove that it was done with a bad intent. *Bentall* v. *United States,* 262 F. 744. When an act or omission is a crime only if it is "wilfully" done, a specific wrongful intent is of the essence of the offense; that is, there must be not only knowledge of the existence of the obligation but a wrongful intent to evade it. *Hargrove* v. *United States,* 67 F. 2d 820.

Criminal intent has been defined as "a mind at fault before there can be a crime"; as such it is an essential fact to be proved in the establishment of guilt; though Congress may define an offense without unlawful intent, a statute will not be so construed unless such legislative intent is clear. *Masters* v. *United States,* 42 App. D. C. 350; *United States* v. *Burroughs,* 65 F. 2d 796, affirmed in part, 290 U. S. 534.

Thus, when specific intent is a part of the crime, the existence of such intent must be proved as a fact like any other fact in the case, and it is not presumed from the commission of an unlawful act. *Parkersburg Transportation Company* v. *City of Parkersburg,* 107 U. S. 691; *Savitt* v. *United States,* 59 F. 2d 541; *United States* v. *Burnett,* 53 F. 2d 219; *United States* v. *Houghton,* 14 F. 544; *Herrman* v. *Lyle,* 41 F. 2d 759. A criminal intent is necessary unless the statute otherwise provides. *Nosowitz* v. *United States,* 282 F. 575.

"There can be no crime, large or small, without an evil mind. In other words, punishment is a sequence of wickedness, without which it cannot be."—*Bishop on Criminal Law*, Secs. 287, 288.

As said in *Felton* v. *United States*, 96 U. S. 699: " . . . doing or omitting to do a thing knowingly or wilfully implies not only knowledge of the thing but a determination with a bad intent to do it or to omit doing it."

In this case Gibson had good and reasonable grounds for believing that he could not be required to report and remain at the camp, which should have been considered in determining the guilt of the defendant.

The Act defines guilt as the failure to perform a duty imposed by the Act. If Gibson has no duty or because of an exemption provided by the Act in good faith believes he has no duty, the court and jury should consider it. The failure to comply with the order does not conclusively establish a violation of a duty under the Act. There are other factors which may be considered. If a selectee is ill, had an accident, was prevented from appearing by storm or mistake, he could show that in defense. (*United States* v. *Hoffman*, 137 F. 2d 416; *United States* v. *Grieme*, 128 F. 2d 811)* Similarly, good-faith belief that the order is invalid is also permissible as a defense.

* Cf. *United States* v. *Madole* (CCA 2) 145 F. 2d 466.

Conclusion

The judgments of the courts below should be reversed and the indictments ordered dismissed. In the alternative, the judgments should be reversed and the causes remanded to the trial courts for new trials not inconsistent with the opinions that may be written herein.

Respectfully submitted,

TAZE HAMRICK GIBSON
and
GEORGE WILLIAM DODEZ
By HAYDEN C. COVINGTON
Their Attorney of Record

VICTOR F. SCHMIDT
of Counsel for
GEORGE WILLIAM DODEZ

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HAYDEN C. COVINGTON
Counsel for Petitioner

No. 86

GEORGE WILLIAM DODEZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAYDEN C. COVINGTON VICTOR F. SCHMIDT
Counsel for Petitioner

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FOR PETITIONERS' BRIEF

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THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED

[Falbo-Dodez-Gibson]*

* * *

* Preceding each section of the Regulations herein reproduced, the bracketed words "Falbo", "Dodez" and/or "Gibson" are shown to indicate the sections as they existed at the time these men, respectively, were ordered to report for work of national importance.

* * *

Sec. 3. Training and service in general. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further*, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces. The President is authorized from time to time, whether or not a state of war exists, to select and induct

into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: *Provided,* That within the limits of the quota determined under section 4 (b) for the subdivision in which he resides, any person, regardless of race or color, between the ages of eighteen and forty-five, shall be afforded an opportunity to volunteer for induction into the land or naval forces of the United States for the training and service prescribed in subsection (b), but no person who so volunteers shall be inducted for such training and service so long as he is deferred after classification: *Provided further,* That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: *Provided further,* That no men shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations, for such men, as may be determined by the Secretary of War or the Secretary of the Navy, as the case may be, to be essential to public and personal health: *Provided further,* That except in time of war there shall not be in active training or service in the land forces of the United States at any one time under subsection (b) more than nine hundred thousand men inducted under the provisions of this Act. The men inducted into the land or naval forces for training and service under this Act shall be assigned to camps or units of such forces: *Provided further,* That no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth.

* * *

Sec. 5. Persons not required to register; Deferment, exemptions, and relief from training and service.

* * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * *

SELECTIVE SERVICE REGULATIONS

* * *

AVAILABLE FOR OR IN MILITARY SERVICE.

* * *

[Falbo-Dodez-Gibson]

622.44 Class IV-D: Minister of religion or divinity student.

(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

* * *

AVAILABLE FOR WORK OF NATIONAL IMPORTANCE UNDER CIVILIAN DIRECTION

[Falbo-Dodez-Gibson]

622.51 Class IV-E: Available for work of national importance; conscientious objector. (a) In Class IV-E shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

(b) Upon being advised by the Director of Selective Service that a registrant who was inducted into the land or naval forces for military service will be discharged because of conscientious objections which make him unadaptable to military service, the local board shall change such registrant's classification and place him in Class IV-E. The Director of Selective Service shall assign such registrant to work of national importance under civilian direction.

• • •

PART 625—APPEARANCE BEFORE LOCAL BOARD

[Falbo-Dodez-Gibson]

625.1 Opportunity to appear in person. (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board

finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2 Appearance before local board. (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as inter-

preter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same

right of appeal as in the case of an original classification.

* * *

REOPENING REGISTRANT'S CLASSIFICATION

[Fallo-Dodez-Gibson]

626.1 Classification not permanent. (a) No classification is permanent.

(b) Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

* * *

PART 629—PHYSICAL EXAMINATION
DUTIES OF REGISTRANT UPON RECEIVING ORDER TO REPORT FOR PHYSICAL EXAMINATION

[Dodez]

629.1 Who will be examined. (a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent.

(b) The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore, when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical

examination, he will be given a new preinduction physical examination before he is ordered to report for induction unless the Director of Selective Service or the State Director of Selective Service directs otherwise.

• • •

[Gibson]

629.1 Who will be examined. Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent.

• • •

[Falbo-Dodez-Gibson]

629.2 Order to report for preinduction physical examination. (a) In accordance with instructions of the Director of Selective Service, the State Director of Selective Service will issue to each local board a Call—Preinduction Physical Examination (Form 224) specifying thereon the number of specified registrants to be delivered for preinduction physical examination and the time and place fixed for such delivery.

(b) The local board shall mail an Order to Report—Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I-A or Class I-A-O under the provisions of section 623.21 to fill each Call—Preinduction Physical Examination (Form 224) which it receives. In filling such calls, the local board, as far as practicable, shall first select volunteers, then nonfathers, and finally fathers, and within each group shall make such selections in sequence of order numbers without regard to whether the registrant has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken.

(c) The local board shall also mail an Order to Report—Preinduction Physical Examination (Form 215) to each registrant classified in Class IV-E when his order number is reached (without regard to whether he has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken) in the process of ordering Class I-A and Class I-A-O registrants to report for preinduction physical examination under the provisions of paragraph (b) of this section.

(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I-A, Class I-A-O, or Class IV-E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service.

(e) At the time the local board prepares the original Order to Report—Preinduction Physical Examination (Form 215), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (Form 53).

[Falbo-Dodez-Gibson]

629.3 Preparing records for a group ordered to report for preinduction physical examination. (a) As soon as the local board has mailed Orders to Report—Preinduction Physical Examination (Form 215) to all registrants who are directed to appear for such preinduction physical examination at a particular time and place, it shall:

(1) Prepare in quadruplicate a Physical Examination List (Form 217), entering thereon the name and order number of each such registrant and indicating in column 3 thereof whether such registrant is a nonfather or a father.

(2) Prepare the Original, the First Copy, and the

Second Copy of the Report of Physical Examination and Induction (Form 221) for each such registrant, and complete Section I thereof.

(3) Prepare the Original and Copy of Certificate of Fitness (Form 218) for each such registrant, placing thereon the local board stamp and the registrant's name and order number.

(4) Assemble and attach to the registrant's Report of Physical Examination and Induction (Form 221) the prepared Original and Copy of the Certificate of Fitness (Form 218); and waiver of disqualification, order terminating civil custody, Alien's Personal History and Statement (Form 304) or Statement of United States Citizen of Japanese Ancestry (Form 304A) bearing the armed forces' endorsement of acceptability for military service; all records available bearing upon the medical, social, and educational history of such registrant; and all other information that should be considered by the armed forces in determining the fitness of the registrant for military service.

(b) Whenever a registrant referred to in paragraph (a) is transferred to another local board for preinduction physical examination, a notation of such transfer shall be made in column 3 of the Physical Examination List (Form 217) and all of the other records of such registrant prepared under paragraph (a) shall be transmitted to the local board to which such registrant is transferred for preinduction physical examination in the manner and at the time provided in section 629.11.

• • •

PREINDUCTION PHYSICAL EXAMINATION

[Dodez]

629.21 Duty of registrant to report for and submit to preinduction physical examination. When the local board mails to a registrant an Order to Report—Preinduction Physical Examination (Form 215), it shall be the duty of the registrant to report for such examination at the time and place fixed in such order unless, after the date the Order to Report—Preinduction Physical Examination (Form 215) is mailed and prior to the time fixed therein for the registrant to report for his preinduction physical examination, he has received from the local board a Notice of Classification (Form 57) advising him that he has been placed in Class IV-F. It shall also be the duty of each such registrant upon reporting for preinduction physical examination (1) to follow the instructions of a member or clerk of the local board as to the manner in which he will be transported to the location where his preinduction physical examination will take place, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for preinduction physical examination, (3) to appear for and submit to such examination as the commanding officer of the induction station shall direct, and (4) to follow the instructions of a member or clerk of the local board as to the manner in which he will be transported on his return trip from the place where his preinduction physical examination takes place.

* * *

[Gibson]

629.21 Duty of registrant to report for and submit to preinduction physical examination. (a) When the local board mails to a registrant an Order to Report—Preinduction Physical Examination (Form 215), it shall be the duty of the registrant to report for such examination at

the time and place fixed in such order unless, after the date the Order to Report—Preinduction Physical Examination (Form 215) is mailed and prior to the time fixed therein for the registrant to report for his preinduction physical examination, the local board cancels such Order to Report —Preinduction Physical Examination (Form 215) or postpones the time when such registrant shall so report and advises the registrant in writing of such cancellation or postponement.

(b) If the time when the registrant is ordered to report for preinduction physical examination is postponed, it shall be the continuous duty of the registrant to report for preinduction physical examination upon the termination of such postponement and he shall report for preinduction fixed by the local board. Regardless of the time when or physical examination at such time and place as may be the circumstances under which a registrant fails to report for preinduction physical examination when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for preinduction physical examination to his local board and to each local board whose area he enters or in whose area he remains.

(c) Upon reporting for preinduction physical examination, it shall be the duty of the registrant: (1) To follow the instructions of a member or clerk of the local board as to the manner in which he will be transported to the location where his preinduction physical examination will take place, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for preinduction physical examination, (3) to appear for and submit to such examination as the commanding officer of the induction station shall direct, and (4) to follow the instructions of a member or clerk of the local board as to the manner in which he will be transported on his return trip from the place where his preinduction physical examination takes place.

[Dodez-Gibson]

629.22 Forwarding registrants for preinduction physical examination. When the registrants who are to be forwarded for preinduction physical examination have assembled, the local board shall proceed as follows:

(a) The roll shall be called, using the previously prepared Physical Examination List (Form 217) and any absences shall be recorded in the Remarks column.

(b) As each registrant's name is called he shall be observed by a member, or clerk, of the local board. If the member or clerk of the local board knows or sees a registrant who he believes may be disqualified for military service because of a manifestly disqualifying defect listed in the List of Defects (Form 220), the registrant shall not be forwarded for preinduction physical examination on that day but shall be given a local board physical examination as provided in section 629.4 and if not disqualified shall then be forwarded for a preinduction physical examination.

(c) A leader and assistant leaders shall be appointed and furnished with proper credentials.

(d) The leader shall be given the following:

(1) The original and all copies of the Physical Examination List (Form 217).

(2) For each registrant being forwarded, the original and both copies of the Report of Physical Examination and Induction (Form 221) and the original and copy of the Certificate of Fitness (Form 218) and other records referred to in subparagraph (4) of paragraph (a) of section 629.3.

(3) Transportation and meal and lodging requests for the group, both for the trip to the induction station and for the return trip.

The leader shall be instructed to deliver the original and copies of the Physical Examination List (Form 217), all

Reports of Physical Examination and Induction (Form 221), all Certificates of Fitness (Form 218), and other information to the commanding officer of the induction station or his representative. He shall be instructed to return any unused portions of the transportation requests or any unused meal and lodging requests to the local board.

(e) The local board shall instruct all registrants in the group that it is their duty to obey the instructions of the leader or assistant leaders during the time they are going to and returning from the induction station; that they will be met by proper representatives of the armed forces when they arrive at the induction station; that while they are at the induction station, they will be subpect to and must obey the orders of the representatives of the armed forces; that they must present themselves for and submit to such examination as the commanding officer of the induction station shall direct; that they will be returned to the local board when the examination is completed.

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ACTION TAKEN AFTER PREINDUCTION PHYSICAL EXAMINATION

[Dodez]

629.31 Records completed at induction station. (a) After preinduction physical examination, the armed forces will:

(1) Complete Sections III and IV, Items 69 and 70 of Section V, and, if the registrant is rejected, Items 71 of Section V of the Original, the First Copy, and the Second Copy of the Report of Physical Examination and Induction (Form 221). The armed forces will stamp at the top of page 1 of the Original, the First Copy, and the Second Copy of the Report of Physical Examination and Induction (Form 221) either "Army —General Service," "Army—Limited Service," or "Navy" except when the registrant is rejected or his

status is not finally determined because of incomplete records or serology which is not satisfactory.

(2) Complete the original and copy of Certificate of Fitness (Form 218) for each registrant who is accepted or rejected. When the serology of an accepted registrant is positive, Item 8 of the Certificate of Fitness (Form 218) will also be completed.

(3) Complete Item 6 of the Certificate of Fitness (Form 218) for each registrant whose status is not determined because his serology is not satisfactory.

(4) Complete Item 7 of the Certificate of Fitness (Form 218) for each registrant whose status is not determined because of incomplete records.

(5) Complete entries in column 4 of Physical Examination List (Form 217).

(b) After completing the records in the manner provided in paragraph (a) of this section, the induction station will return all records to the local board except (1) for registrants inducted, it will retain the Original of the Report of Physical Examination and Induction (Form 221); (2) it will retain one copy of the Physical Examination List (Form 217), forward one copy of such list to the Director of Selective Service, 10th Floor, Gimbel Building, 35 S. 9th Street, Philadelphia, Pennsylvania, and forward one copy of such list to the State Director of Selective Service; and (3) it will forward all records bearing upon the medical, social, and educational history of the registrant to the State Director of Selective Service.

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[Gibson]

629.31 Records returned to local board. (a) The Commanding Officer of the induction station will return to the local board the following documents concerning registrants forwarded for preinduction physical examination: The original Physical Examination List (Form 217) indicating

under column 4 the disposition of each registrant forwarded for preinduction physical examination, the Original, First Copy, and Second Copy of the Report of Physical Examination and Induction (Form 221), and all other records forwarded by the local board except the records bearing upon the medical, social and educational history of the registrant.

(b) Upon receipt of the documents described in paragraph (a) above, the local board shall take the following actions:

(1) File the original Physical Examination List (Form 217).

(2) For each registrant found acceptable, file the Original, First Copy, and Second Copy of the Report of Physical Examination and Induction (Form 221) in the Cover Sheet (Form 53).

(3) When the registrant has been reclassified because of being rejected upon preinduction physical examination, transmit the First Copy of the Report of Physical Examination and Induction (Form 221) for such registrant to the State Director of Selective Service for review and transmission to the Surgeon General's Office, War Department, Washington 25, D. C., using Transmission of Reports of Physical Examination and Induction (Form 205) as a covering memorandum and file the Original and Second Copy of the Report of Physical Examination and Induction (Form 221) in the Cover Sheet (Form 53).

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[Gibson]

629.31—1 Disposition of other records by armed forces. The Commanding Officer of the induction station will dispose of the documents described below as follows concerning registrants forwarded for preinduction physical examination:

(1) Retain one copy of Physical Examination List (Form 217).

(2) Forward one copy of the Physical Examination List (Form 217) to the Director of Selective Service, 10th Floor, Gimbel Building, 35 S. 9th Street, Philadelphia, Pennsylvania, and forward one copy of such List to the State Director of Selective Service.

(3) Forward all records bearing upon the medical, social and educational history of the registrant to the State Director of Selective Service.

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[Dodez]

629.32 Mailing Certificate of Fitness to registrants accepted or rejected. When a Certificate of Fitness (Form 218) indicates that a registrant has been accepted for the Army or the Navy or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40).

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[Gibson]

629.32 Mailing Certificate of Fitness to registrant accepted or rejected. When a Certificate of Fitness (Form 218) indicates that a registrant has been found acceptable for general military service or acceptable for limited military service or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40).

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SPECIAL CASES

[Falbo-Dodez-Gibson]

629.41 Director to determine. Notwithstanding any of the provisions of this part, the Director of Selective Service under such procedures as he prescribes and based upon such information concerning the registrant's physical and mental fitness as he specifies, may direct a local board to classify a registrant in Class IV-F or Class I-C under section 623.53 or as available for service. When he does so, the local board shall classify the registrant as directed.

* * *

SELECTION OF CLASS IV-E REGISTRANTS FOR FINAL-TYPE PHYSICAL EXAMINATION AND PREPARATION OF NECESSARY FORMS

[Falbo]

651.1 Selection of registrants for assignment to work of national importance. Every registrant who is classified in Class IV-E, before he is assigned to work of national importance under civilian direction, shall be given a final-type physical examination for registrants in Class IV-E. Each such registrant shall be ordered to report for such examination when his order number is reached in the process of selecting Class I-A and Class I-A-O registrants to report for induction, provided his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance to take an appeal has expired.

[Falbo]

651.2 Ordering Class IV-E registrants to report for final-type physical examination. (a) When the order number of a registrant placed in Class IV-E has been reached under the circumstances set out in section 651.1, the local board shall prepare for each such man an Order to Report for Final-Type Physical Examination (Form 48A) in triplicate. The local board shall mail the original to the regis-

trant, shall mail one copy to the Director of Selective Service, and shall file the remaining copy in the registrant's Cover Sheet (Form 53).

(b) The time specified for reporting shall be at least 10 days after the date the order is mailed; provided, however, if the registrant is quarantined because of a communicable disease, is sick, has some temporary ailment, is awaiting an operation, or when he has some other good and sufficient reason for being unable to appear, the local board may, after the Order to Report for Final-Type Physical Examination (Form 48A) has been issued, postpone the date when any such registrant is to appear for final-type physical examination.

(c) The time of issuance and the date of expiration of any period of delay or postponement authorized in (b) above shall be noted in the "Remarks" column of the Classification Record (Form 100).

[Falbo]

651.3 Separate Delivery List (Form 151) for Class IV-E registrants. (a) Before the time set for Class IV-E registrants to report for final-type physical examination, the local board shall prepare a separate Delivery List (Form 151) for Class IV-E registrants, in triplicate, and stamp each such list at the top with the notation "IV-E." The local board shall make no entry in column 4 of this form.

(b) If a Class IV-E registrant fails to report as ordered, his absence shall be noted in column 3 of the Delivery List (Form 151) prepared for Class IV-E registrants before it is turned over to the leader of such registrants.

(c) If a Class IV-E registrant ordered to report for final-type physical examination has been transferred to another local board for final-type physical examination, his name shall nevertheless be carried on the Delivery List (Form 151) for Class IV-E registrants in the same manner as though he were being sent for final-type physical exam-

ination, but a notation shall be made in column 3 oposite his name stating that he was transferred to another local board for final-type physical examination and identifying the local board to which such man was transferfed for final-type physical examination.

(d) If a Class IV-E registrant ordered to report for final-type physical examination has been transferred from another local board for final-type physical examination, his name shall appear on the Delivery List (Form 151) for Class IV-E registrants but a notation shall be made in column 3 opposite his name stating that he was transferred from another local board for final-type physical examination and identifying the local board from which such man was transferred for final-type physical examination.

[Falbo]

651.4 Transportation requests and meal or lodging requests. (a) Before the time set for Class IV-E registrants to report for final-type physical examination at the induction station, the local board, unless otherwise directed, shall prepare Government Requests for Transportation (Standard Form No. 1030) and Government Requests for Meals or Lodgings for Civilian Registrants (Form 256) to cover the Class IV-E registrants' trip to the induction station and return to the local board.

(b) As a convenience to the leader of the Class IV-E registrants, the local board may exchange the prepared transportation requests for transportation tickets.

[Falbo]

651.5 Records sent to induction station for Class IV-E registrants. For each Class IV-E registrant ordered to report for final-type physical examination, the following papers shall be turned over to the leader of the Class IV-E registrants for delivery to the commanding officer of the induction station:

(1) The original and all three copies of the Report of Physical Examination and Induction (Form 221), which will be stamped by the local board with the notation "IV-E" at the top and immediately left of the block provided for the local board stamp and in the blank space provided for the registrant's name in item 79 (a); and

(2) Three copies of the Delivery List (Form 151) stamped by the local board at the top with the notation "IV-E."

[Falbo]

651.6 Appointment of leader for Class IV-E registrants. The local board shall designate one Class IV-E registrant to be the leader of the group of such registrants in the same manner as it selects a leader for selected men under the provisions of section 633.2.

[Falbo]

651.7 Procedure for sending Class IV-E registrants to the induction station for final-type physical examination. (a) At the time and place designated for the Class IV-E registrants to report for final-type physical examination, the local board shall:

(1) Call the roll of Class IV-E registrants.

(2) Read and issue the appointment of the leader of Class IV-E registrants.

(3) Turn over to the leader of Class IV-E registrants the transportation request or tickets and the meal and lodging requests to cover a trip to the induction station and return to the local board and records for final-type physical examination.

(4) Specifically order the Class IV-E registrants to obey their leader.

(5) Specifically order the Class IV-E registrants

to report to the induction station and, after final-type physical examination, to return to the local board.

(b) Class IV-E registrants shall proceed to the induction station for their final-type physical examination along with the selected men who are being delivered to the induction station with the next call on the local board, but if there is no such delivery of men to fill a call at an early date, it shall deliver such Class IV-E registrants specially whenever the induction station is receiving men.

[Falbo]

651.8 Final-type physical examination at induction station. At the induction station, Class IV-E registrants will be given a final-type physical examination in the same manner as that conducted for selected men. Upon completion of the final-type physical examination, Class IV-E registrants will return to their local board under direction of their leader.

[Falbo]

651.9 Records returned by induction station commander for Class IV-E registrants. Each local board delivering Class IV-E registrants for final-type physical examination to an induction station will receive by mail from the induction station commander the following records: (1) The original and all copies of the Delivery List (Form 151) for Class IV-E registrants and (2) the original and all three copies of the Report of Physical Examination and Induction (Form 221). The local board will then forward to the State Director of Selective Service of its State a copy of each Delivery List (Form 151) for Class IV-E registrants.

[Falbo]

651.10 Action of local board following final-type physical examination of Class IV-E registrants. (a) When the Report of Physical Examination and Induction (Form 221) indicates that a registrant in Class IV-E is physically and mentally qualified for service, such registrant will be assigned to and delivered for work of national importance under civilian direction in the manner provided in part 652. Until the registrant is forwarded for work of national importance under civilian direction, the original and all copies of the Report of Physical Examination and Induction (Form 221) of each such registrant will be retained by the local board in the registrant's Cover Sheet (Form 53).

(b) When the Report of Physical Examination and Induction (Form 221) indicates that a registrant in Class IV-E is physically, mentally, or otherwise disqualified for service, the local board shall reopen his classification and classify him in Class IV-F. The Surgeon General's Copy and the National Headquarters' Copy of the Report of Physical Examination and Induction (Form 221) of each such registrant will be forwarded to the State Director of Selective Service, who will forward both copies to the Director of Selective Service, and the Armed Forces' Original and the Local Board's Copy of the Report of Physical Examination and Induction (Form 221) will be filed in the registrant's Cover Sheet(Form 53).

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ASSIGNMENT TO WORK OF NATIONAL IMPORTANCE

[Falbo-Dodez]

652.1 Report of conscientious objector to Director of Selective Service. (a) When a registrant in Class IV-E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction.

(b) Four copies of the Conscientious Objector Report (Form 48) shall be filled out and signed by a member of the local board. Under "Remarks" the local board should add any additional information that might aid in the proper assignment of the registrant. The original and two copies of the Conscientious Objector Report (Form 48) shall be mailed to the State Director of Selective Service and the remaining copy retained in the registrant's Cover Sheet (Form 53). The State Director of Selective Service shall immediately transmit the original and one copy of the Conscientious Objector Report (Form 48) to the Director of Selective Service and shall file the remaining copy.

(c) Until such time as his defects have been corrected, no Conscientious Objector Report (Form 48) shall be filled out or used for a registrant who, according to the report of the examining physician, will be qualified for general service after satisfactory correction of specified remediable defects.

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[Gibson]

652.1 Report of conscientious objector to Director of Selective Service. (a) When a registrant is classified in Class IV-E and his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired, and his order number is reached in the process of selecting Class I-A and Class I-A-O registrants to report for induction, the local board shall immediately notify the Director of Selective Service on Conscientious Objector Report (Form 48) that the registrant is available for assignment to work of national importance under civilian direction.

(b) When a registrant is classified in Class IV-E and identified by following his classification with the letter "(L)" and his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired, and his order number is reached in the process of selecting Class I-A and Class I-A-O registrants to report for induction whose classifications are identified with the letter "(L)," the local board shall immediately notify the Director of Selective Service on Conscientious Objector Report (Form 48) that the registrant is available for assignment to work of national importance under civilian direction.

(c) Four copies of the Conscientious Objector Report (Form 48) shall be filled out and signed by a member of the local board. Under "Remarks" the local board should add any additional information that might aid in the proper assignment of the registrant. The original and two copies of the Conscientious Objector Report (Form 48) shall be mailed to the State Director of Selective Service and the remaining copy retained in the registrant's Cover Sheet (Form 53). The State Director of Selective Service shall

immediately transmit the original and one copy of the Conscientious Objector Report (Form 48) to the Director of Selective Service and shall file the remaining copy.

(d) Until such time as his defects have been corrected, no Conscientious Objector Report (Form 48) shall be filled out or used for a registrant who, according to the report of the examining physician, will be qualified for general service after satisfactory correction of specified remediable defects.

[Falbo]

652.2 Assignment by Director of Selective Service. (a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall forward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local board other than the registrant's local board, the registrant's local board will be notified of such action so that appropriate notations may be made in its records.

(b) Persons paroled for assignment to work of national importance under civilian direction or other special service under part 643 shall be assigned to such work by the Director of Selective Service in such manner as he may determine.

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[Dodez-Gibson]

652.2 Assignment by Director of Selective Service. (a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall forward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local board other than the registrant's local board, the registrant's local board will be notified of such action so that appropriate notations may be made in its records.

(b) Persons paroled for assignment to work of national importance under civilian direction or other special service under part 643 shall be assigned to such work by the Director of Selective Service in such manner as he may determine.

DELIVERY OF PERSONS WHO HAVE BEEN ASSIGNED TO WORK OF NATIONAL IMPORTANCE UNDER CIVILIAN DIRECTION

[Falbo]

652.11 Preparation and distribution of Order to Report; delinquency of IV-E registrants. (a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV-E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Armed Forces' Original, the Surgeon General's Copy, and the National Headquarters' Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Local Board's Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service: Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

(b) The issuance of an Order to Report for Work of National Importance (Form 50) may be delayed or delivery under such an order may be postponed to the extent and in the manner provided in section 633.1.

(c) If for any reason an Order to Report for Work of National Importance (Form 50) is not sent to a registrant for whom an Assignment to Work of National Importance (Form 49) has been received from the Director of Selective Service, or in the event a registrant who has been sent an Order to Report for Work of National Importance (Form 50) does not report to the local board pursuant to such order, the local board shall report such fact to the Director of Selective Service through the State Director of Selective Service. If any such registrant becomes delinquent by reason of his failure to perform any of his obligations under the selective service law, his case should be handled under the provisions of part 642 in the same manner as in the case of any other delinquent registrant.

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[Dodez-Gibson]

652.11 Preparation and distribution of Order to Report; delinquency of IV-E registrants. (a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV-E: Mail the original of the order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Original and the First Copy of the registrant's Report of Physical Examina-

tion and Induction (Form 221), to the camp directors, and retain the Second Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service: Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant, as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

(b) The issuance of an Order to Report for Work of National Importance (Form 50) may be delayed or delivery under such an order may be postponed to the same extent and in the same manner as provided in section 633.2 with reference to an Order to Report for Induction (Form 150).

(c) If for any reason an Order to Report for Work of National Importance (Form 50) is not sent to a registrant for whom an Assignment to Work of National Importance (Form 49) has been received from the Director of Selective Service, or in the event a registrant who has been sent an Order to Report for Work of National Importance (Form

50) does not report to the local board pursuant to such order, the local board shall report such fact to the Director of Selective Service through the State Director of Selective Service. If any such registrant becomes delinquent by reason of his failure to perform any of his obligations under the selective service law, his case should be handled under the provisions of part 642 in the same manner as in the case of any other delinquent registrant.

[Falbo-Dodez-Gibson]

652.12 Transportation to camp. (a) When a registrant in Class IV-E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian direction as is followed in the case of a registrant delivered for induction into the land or naval forces.

(b) The delivery of a person paroled to work of national importance under civilian direction will be accomplished by the proper prison officials.

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652.13 Jurisdiction of local board while registrant is engaged in work of national importance. A registrant in Class IV-E who has reported for work of national importance pursuant to this part shall be retained in Class IV-E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such regis-

trant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status.

DESIGNATION AND ADMINISTRATION

[Falbo-Dodez-Gibson]

653.1 Work projects. (a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all projects is vested in the Director of Selective Service.

[Falbo-Dodez-Gibson]

653.2 Camps. (a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a technical agency using funds provided by the Selective Service System and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service.

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[Falbo-Dodez-Gibson]

653.5 Communications concerning assignees. In no event will the camp director communicate with the local board or the State Director of Selective Service concerning assignees, but all such communications shall be directed to the Director of Selective Service, Washington, D. C.

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[Falbo]

653.11 Reception at camps. (a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

(c) If the assignee indicates that his physical condition has changed since his final-type physical examination for

registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary.

(d) The camp director shall complete Item 79 of the Report of Physical Examination and Induction (Form 221), changing such parts thereof as may be required. The camp director shall retain the Armed Forces' Original of the Report of Physical Examination and Induction (Form 221) and shall forward the Surgeon General's Copy and the National Headquarters' Copy thereof to the Director of Selective Service.

(e) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(f) Upon receiving notice that a registrant has been rejected for work of national importance, the local board shall reopen his classification and classify him in Class IV-F.

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[Dodez]

653.11 Reception at camps. (a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain

one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) The camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(c) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

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[Gibson]

653.11 Reception at camps. (a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp Director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate

State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the ci ilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

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[Falbo-Dodez-Gibson]

653.12 Duties. Assignees shall report to the camp to which they are assigned; remain therein until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties promptly

and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued from time to time by the Director of Selective Service.

* * *

[Falbo-Dodez-Gibson]

653.16 Release for some reason other than for induction into the land or naval forces. (a) The Director of Selective Service may release an assignee from active participation in work of national importance under civilian direction prior to the completion of his period of service under conditions which would warrant release by the Secretary of War or the Secretary of the Navy of a registrant who has been inducted into the land or naval forces.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 23

TAZE HAMRICK GIBSON, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner's
REPLY BRIEF
on reargument

HAYDEN C. COVINGTON
Counsel for Petitioner

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MAY IT PLEASE THE COURT:

The same arguments made by the Government for the affirmance of the judgment of conviction of the petitioner were urged in the *Smith* and *Estep* cases. All these arguments were rejected by this Court in the *Estep-Smith* decision. (327 U. S. 114-125) The considerations of policy as grounds for denying in criminal proceedings the right to challenge the draft board determinations were held to be insufficient in those cases.

The weakness of the same considerations prevails here. Such policy arguments ought not to be permitted to rob Gibson of his right to attack the administrative action

here, especially when the undisputed evidence showed indisputably that he was attempting, in good faith, to exhaust his administrative remedies by reporting at the camp to make final his acceptance, which this Court held, in the *Falbo* decision, was necessary to be done. There should be no penalty imposed against Gibson by forfeiture of his defense because of the uncertainty of the law. Even all this country's federal judges (except some on this Court who, before the *Estep* decision, had not expressed themselves) did not know then what the law required a registrant to do as a condition precedent to challenging a draft board determination in a criminal case. Falbo was denied his right to challenge the order in his case because he did not go far enough in the administrative process. Gibson did what Falbo did not do. Now the Government, taking a stand inconsistent with that taken in the *Falbo* case as to when the administrative remedies are exhausted, has the audacity to urge the Court to impose a penalty against Gibson for trying to comply with this Court's decision in the *Falbo* case.

There is no difference between the time that the selective process ended when Falbo was ordered to report and when Gibson was ordered to report. Falbo had been accepted upon a final-type (preinduction) physical examination before he was ordered to report. Gibson also had been accepted upon a preinduction physical examination before he was ordered to report. If the selective process had ended when Gibson had undergone the preinduction physical examination it also had ended when Falbo completed the preinduction physical examination. Gibson was attempting to do everything the law required of him except give up the exempt status that the Act provided for ministers of religion. Certainly the law did not require him to give up his ministry (which the Act exempted him to carry on) as a condition precedent to getting judicial review of the illegality of the draft board action. He would have been required to stay

away from his missionary field for months while attempting to get review by *habeas corpus*. His presence at the camp pending the action would have been required. The camp was hundreds of miles away from his field of ministry. He knew that he would have been required to give up his ministry and break his covenant with Jehovah God to preach if he had remained at the camp. He went as far as he possibly could go in an attempt to comply with the law of the land and the suggestions of this Court in the *Falbo* decision when he went to the camp to undergo the physical examination and then left after it was given to him.

Falbo could not have been rejected at the camp had he reported, because there had been no change in his physical condition after his final-type (preinduction) physical examination; and if there had been, he would have been kept in the camp pending instructions from the Director of Selective Service on whether he should be hospitalized.

Gibson could not have been rejected at the camp either. But since this Court held it was necessary for Falbo to report Gibson had every reason to believe that under the substantially identical regulations and circumstances he was required to report in order to completely exhaust his administrative remedies. He should not be penalized now by this Court because he attempted to comply with this Court's decision in the *Falbo* case. If any mistake was made by Gibson in construing the Regulations, it was because of the mistake that this Court made in construing the Regulations when it held that Falbo had not completed the selective process by his failure to report at the civilian public service camp as ordered. It is wrong to punish the petitioner now for doing what easily could have been avoided if this Court had properly interpreted the Regulations in the first place. The predicament in which the Government attempts to place petitioner is the proximate result of this Court's decision in the *Falbo* case and not of the petitioner's desire to violate and flout the law as the Government has wrong-

fully charged him with doing. It is fundamental that one should not be punished for acts proximately and solely caused by another. The decision in the *Falbo* case should be specifically overruled as requested by Dodez in his brief in *Dodez* v. *United States*, No. 86, October Term 1946. The Government has stipulated to a reversal of the judgment of conviction in that case. But that is not enough. Because of the injustice suffered by Gibson and Dodez in both these cases the decision in the *Falbo* case should be overruled by name in order that justice may be done.

There is no difference in the procedure of the selective process in the cases of Falbo, Gibson and Dodez. The pre-induction physical examination followed by acceptance for work of national importance preceding the issuance of the order to report to a civilian public service camp completed the selective process in all three cases. The examination at the camp in all three cases had nothing whatever to do with the selective process which had already been completed before the registrants were ordered to report. The fact that they may thereafter have been discharged from the civilian public service camps had nothing to do with the completion of the selective process or the exhaustion of the administrative remedies.

The Government's argument that orderly procedure required Gibson to remain at the camp, as commanded in the order to report, is of no greater weight than it was in the *Smith* and *Estep* cases. The orders issued by the boards in those cases required them to submit to induction after reporting. They violated the Act as much by refusing to submit as they would have done had they failed to report at all. The duty to remain after reporting is no heavier than the duty to report after having been ordered to report to a civilian public service camp.

The Government argues that silence of the Act required the petitioner to remain at the Camp after reporting as ordered. If silence of the Act did not require Smith and

Estep to submit to induction in their cases, then it cannot be said to require Gibson to submit to the order to report in his case by remaining after reporting, as the orders did not require of Smith and Estep. If the policy argument does not require a registrant who desires to challenge an illegal classification as a conscientious objector to report for work of national importance as a condition precedent to urging such invalidity, then by force of the same reason it does not require the same registrant to remain at the camp after reporting at the civilian public service camp. Departure from the camp after reporting is just as serious a violation of the Act as is failure to report after being ordered, or the failure to proceed to the camp after appearing at the local board as ordered. If a defense is not available in one case, it ought not to be available in the other circumstances. If it is available in one it should be available in the other instances of violations stated above.

The Government's argument which makes the offense of failure to remain at the camp after reporting as ordered more reprehensible than failure to report at the camp is entirely arbitrary. Violations do not stand on different planes under the Act. All violations are prohibited under the Act. All violations are subject to the same penalty under the Act. By singling out the violation in question here for special treatment and placing it on a different plane the Government is reading into the Act something that is not provided for. The Government asks the Court to perform the legislative function rather than the judicial function.

Besides failing to advance cogent legal reasons for denying petitioner the right to challenge the validity of the action of the administrative agency the specious argument of the Government overlooks the inherent proposition that here the challenge is one of lack of jurisdiction or want of authority. The lack of jurisdiction can not be waived by going beyond the end of the selective process. If the local board had no jurisdiction, the camp had no jurisdiction.

The method of challenging the jurisdiction of the agency does not change under the Act by going too far. All violations of the Regulations are violations of the Act. All violations of the Act are prosecuted in the district courts by indictments. As long as administrative remedies have been exhausted the registrant is entitled to challenge the legality of the administrative action regardless of how far he may have gone. Any other construction upon the Act would be unreasonable and discriminatory.

The Government contends that the status of the petitioner changed upon his acceptance at the camp. This may be true. But nevertheless petitioner remained a civilian. He did not lose his rights as a citizen of the United States. He did not change from civilian to military status and thereby lose his rights as a civilian. Petitioner did not become subject to military rules and regulations. There was no court martial in the civilian public service camp. The Director of Selective Service in charge of the camp did not have authority to force petitioner to remain. All that could be done with petitioner under the Act was prosecute him in the federal district court for failure to perform the duty alleged to be imposed upon him by law.

The petitioner was in no higher duty than a mere civilian employee in any department of the Government not subject to military jurisdiction. He has the same rights of defense in the courts as an employee of any other such department who may be prosecuted for violations of his duty. If such employee had no duty in his office to do the thing he was charged with failing to do, he could show his lack of duty in defense to an indictment despite the fact that his status may have changed when he went to work for the department. So also should petitioner be given the right to show that he had no duty to remain at the camp because of the want of authority of the administrative agency to order him to go to the camp in the first place.

The specious argument is advanced by the Government

that since one who changes his status from civilian to that of a military person has available to him as a remedy to question the jurisdiction of the military authority only the writ of *habeas corpus*, so also one who changes from the civilian status of assignee to the civilian status of a campee is confined to the writ of *habeas corpus* as the only means of questioning the jurisdiction of the administrative agency. The mere fact that the civilian public service camp and the Selective Service System have no police jurisdiction or means of taking custody of a violator of the Regulations dispels as inapplicable the Government's argument. There is no analogy between the two.

The Government talks about the new duty petitioner assumed when he waited at the camp for the physical examination. It should be remembered that the new duty was forced upon petitioner. It was illegally imposed upon him by the order of the local board that had no jurisdiction. There being a want of authority, Gibson did not have to stay at the camp as a condition precedent to showing the lack of jurisdiction.

Disruption of orderly process and work at the civilian public service camp by persons who leave after having reported to exhaust their administrative remedies is urged by the Government as its strongest argument for the denial of the defense in this case. The presence of a registrant in the camp who is questioning the jurisdiction of the camp and disrupting the process of the work in the camp while bringing *habeas corpus* proceedings is as great a danger as, if not greater than, the "desertion" of one who reports for the sole purpose of exhaustion of his administrative remedies. What was said on this subject exhaustively by counsel for petitioners in the *Estep* and *Smith* cases it is not necessary here to repeat. Reference is here made to such argument. See Joint Brief for Petitioners in *Smith* v. *United States*, and *Estep* v. *United States*, Nos. 66 and 292, October Term 1945, at pages 73-74.

The side-argument is made by the Government that requiring the petitioner to remain at the conscientious objector camp while determining by *habeas corpus* his status under the Act and Regulations does not impinge petitioner's conscience. This is untrue. The petitioner testified that for him to remain at the camp would be a violation of his covenant. Moreover, in his letter to the camp director he declared likewise. It is utterly ridiculous to assert that a minister of religion exempted under the Act would have no objection while he is required to wait months in the wilderness detached from his congregation while attempting, hundreds of miles from his home, by *habeas corpus* to get released from the camp. Who would be preaching the gospel, burying the dead and marrying the young while the preacher was interned in the conscientious objector concentration camp in the wilderness from which Congress exempted the minister?

The fallacy of the Government's argument that petitioner should remain in the civilian public service camp and apply for the writ of *habeas corpus* as the only remedy is best demonstrated by an illustration or a hypothetical case. The Congress deferred the Vice President of the United States, judges, members of Congress, members of the state legislatures, and governors of the various states. Now, suppose that all the draft boards in the country wanted to usurp their power and break down the operation of the Government. Assume that, to accomplish this, they ordered all the governors and all the members of the state legislatures together with all the judges, members of Congress and the Vice President of the United States to report at civilian public service camps to do work of national importance in the wilderness. Would all these officers of the government have to go to camps and there remain while their status under the Act was being determined by *habeas corpus?* The mere asking of the question resounds the answer: NO. So if Congress did not intend that the deferred

officers of government would not have to submit to such an ordeal and forfeiture, then by force of the same reason it did not intend that the ministers would have to undergo such an outrageously burdensome procedure to protect their rights under the Act.

Petitioner cannot be compelled to resort to the remedy of *habeas corpus* as the only remedy. That statute did not even mention *habeas corpus* as a remedy under the Act. It is a judicial remedy anyway. The law does not make the citizen choose between judicial remedies. The law does, however, compel one to completely exhaust his administrative remedies as a condition precedent to obtaining judicial review of an administrative action. Petitioner did exhaust his administrative remedies. But since *habeas corpus* is not mentioned in the statute as an administrative remedy the petitioner should not be relegated to it and his fundamental right to defend the indictment brought against him be forfeited because he failed to resort to the remedy. It would be very unfair to the Government in a *habeas corpus* proceeding brought by a campee to deny the camp operator the right to challenge the truthfulness of the allegations made in a petition for writ of *habeas corpus*. But yet the Government wants the Court to be unfair to petitioner by denying him the right to challenge the allegations made in the indictment brought by it.

The decision of this Court in *Yakus v. United States*, 321 U. S. 414, is relied upon by the Government to sustain its argument that one must comply with the law until his rights are determined. The *Yakus* decision is inapplicable. There yet remained a clear statutory remedy under the Act by appeal to the Emergency Court and thence to this Court by petition for writ of certiorari which Yakus had not resorted to. There was a clear failure to follow and exhaust statutory remedies. Here no statutory remedy was provided. *Habeas corpus* after reporting at a camp is admittedly not provided for in the Act or Regulations.

The Government advances the novel and alternative ground that, if it and the courts below were wrong in the contention that no defense is available to one who deserts a civilian public service camp, the denial of petitioner's right to challenge the legality of an administrative order was harmless error. It is urged that petitioner has no defense to the indictment because the Government, in passing upon the validity of petitioner's classification and thus reviewing the action of the draft boards, is of the opinion that petitioner cannot show invalidity of the administrative determination. This is the same old argument advanced by the Government and the United States Circuit Court of Appeals in the *Smith* case. In that case they both contended that the denial of the right to make the defense was harmless error because Smith was shown to have attended the University of South Carolina where he was taking an engineering course and devoted only part of his time to the activity of Jehovah's witnesses. *Smith* v. *United States*, 148 F. 2d 288. See the last paragraph of that opinion. See also the Government's brief filed in this Court in *Smith* v. *United States*, No. 66, October Term 1945, which was answered by Smith in his brief filed in this Court in that case. See Joint Brief for Petitioners, pages 190-194.

The argument of the Government in Part III of its brief (pages 39-56) is answered by the opinion of this Court in the *Estep* and *Smith* cases. "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." (327 U. S. 114, 125) For the same reason it is improper for the Government in this Court to now request the Court to pass upon the merits of Gibson's defense.

It was the duty of the trial court to pass upon the merits of Gibson's defense. The trial court did not do that. It denied Gibson a judicial trial and due process of law. Such

flagrant denial of a judicial trial in ruling out the defense by the trial court cannot be cured by giving petitioner a trial *de novo* here. This Court has no original criminal jurisdiction in this case. It can only review the record made in the trial court. If petitioner was denied a full and fair hearing in the trial court it is the duty of this Court to order a reversal of the judgment and to remand the case to the trial court for a new trial. It cannot give petitioner a trial *de novo* and perform the function that only the district court is authorized to perform.

Since the Government has gratuitously undertaken to discuss the merits of petitioner's defense it is proper and necessary to answer a few of its flagrant inaccuracies before closing this reply brief. Except for a few details that will be discussed hereafter, the entire argument made by the Government about the ministerial status of petitioner was fully discussed by counsel for Smith and Estep in the Joint Brief for Petitioners in *Smith* v. *United States* and *Estep* v. *United States,* Nos. 66 and 292, October Term 1945. See pages 131-190 of that brief, to which reference is here made.

Much emphasis is placed by the Government upon the absence of petitioner's name from the certified official list of Jehovah's witnesses forwarded to State Headquarters by National Headquarters of Selective Service System. To begin with, the requirement made by the Selective Service System that the Watchtower Bible and Tract Society, Inc., file a list of its full-time pioneer ministers with National Headquarters was arbitrary. No other religious organization was required to file a list of its full-time ministers.

The presence or absence or removal of the name of one of Jehovah's witnesses from the list did not justify the local board or the appeal board in denying petitioner's claim for exemption as a minister of religion under the Act. It was the duty of the draft boards to classify each registrant according to the facts appearing in the file irre-

spective of the absence or removal of a name from the list of ministers filed with the National Headquarters.

Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the certified official list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the person whose name was to be added to the list.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of National Headquarters having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the Selective Service National Director changed the policy regarding the adding of names to the list, and discontinued the practice of placing new names upon the certified official list.

This Court can take judicial notice of the records of the Selective Service System showing the policy of that agency with respect to Jehovah's witnesses and the arrangements that the Watchtower Society was forced to comply with. The records of the system showed that such Society recognized and certified all of its ministers, including petitioner, whose names were not on that list to be authentic, duly authorized representatives of it, and it recognized all of its ministers, including petitioner, as ministers regardless of whether their names appeared on the list which was under the control of the Selective Service System.

The System required that the Society notify it when

any full-time minister on the list failed to devote his full time each month. The System made it a policy to drop the names of all persons from the list who did not devote their full time to the ministry every month. Accordingly, the Society complied with the regulation and orders of the System in this respect and kept the System periodically advised as to the time devoted by each man whose name appeared on the list.

Therefore in the fall of 1941 when Gibson, because of circumstances over which he declared he had no control that forced him to diminish his quota of time required of the full-time minister, the Society notified the System that Gibson was not making the time required of the full-time ministers. Pursuant to this notice, which was not of the Society's own volition but as a result of the regulations of the System, the System dropped Gibson's name from the list circulated by National Headquarters to State Headquarters. But the Society at no time dropped the name of Gibson from its list of ministers. The credentials which it had theretofore issued to Gibson and which were on file with the draft board were never withdrawn on canceled by the Society.

Inasmuch as his suspension as an active full-time minister for a short period of rehabilitation did not change his status as a minister with the Society it was not necessary to issue new credentials when he resumed his full-time ministerial activity.

When the local board classified him on November 6, 1942, the policy had been changed and it was impossible to have his name again added to the list. Moreover, the removal of his name from the list was several months before he registered with the local board in 1942. At the time his name was absent from the list. However, when Gibson filed his questionnaire and was later classified by the local board the undisputed evidence showed that he had resumed his full-time status as a pioneer missionary evangelist with

the Society. It was the duty of the board to classify him according to his status when he was classified and not when his name was removed from the list. The action of the draft boards and the argument of the Government is directly contrary to the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633. In that case the court held that the absence of Hull's name from the list did not justify the arbitrary denial of the claim for exemption as a minister. The court pointed out that the list had been abandoned at the time he was classified and that the failure to have his name on the list was immaterial.

On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified list. The Opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally

performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The failure of one of Jehovah's witnesses to have his name to appear upon the certified official list circulated by the Director of Selective Service to all State Headquarters does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on, or has been removed from, the certified official list of pioneer ministers referred to in Opinion No. 14 does not authorize the board to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards."

In a letter from General Hershey, National Director of Selective Service, dated July 7, 1943, concerning the certified official list, he said, *inter alia*, "The official list of Jehovah's Witnesses is no more than information from National Headquarters as to those members, who within

the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name of the list may be considered by the draft boards in classifying a registrant, the absence of or removal of a person's name from the list is not made the conclusive and exclusive test. The list was established and is maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the Selective Service System and the Watchtower Society to exclude from consideration by boards the exemption claim of other persons whose names did not appear on such list.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon the certified official list circuited by National Headquarters to the various State Headquarters of the System. Indeed, the Opinion extends to full-time ministers of Jehovah's witnesses whose names do not appear on or have been removed from the certified official list. Accordingly the action of the Society in notifying the System that Gibson was not putting in full time as a pioneer minister pursuant to the orders of the System which resulted in his name being dropped from the list does not justify the action of the draft boards. Moreover, it does not result in a waiver of the denial of due process of law denied petitioner by the trial court in this case. The action of the System in dropping petitioner's name from the list did not make harmless the error of the district court in denying petitioner a judicial trial.

At no time did the Society inform the State or National Headquarters that Gibson was no longer recognized as a minister by it. The records show without dispute that the Society at all times recognized him as a minister. Furthermore, it shows beyond dispute that from the time of his registration, classification and appeal to the time of his

order to report for work of national importance he was at all times recognized as a minister by the Society and that his full time was devoted to such work.

The Government unjustly charges petitioner with falsification of the records by stating in his Questionnaire that he was ordained in 1938 and by stating in his Occupational Questionnaire that he had been ordained in 1940. This accusation by the Government is wholly unjustified because it is obvious that in the Selective Service Questionnaire he was stating about the time of his formal ordination ceremony which was on September 9, 1938. In the Occupational Questionnaire Gibson was showing the agency that he had been acting as a full time pioneer missionary evangelist since 1940. There was no inconsistency.

It is remarkable that the Department of Justice for the first time in this Court accuses petitioner of falsification. He was not charged with such in the courts below. Moreover, the statement by the Government that the draft boards were justified in rejecting his claim for exemption as a minister because of his alleged falsification is misleading to say the least. It should be observed that the draft boards and the State and National Headquarters of the System never at any time accused the petitioner of falsification. Indeed the draft boards did not deny his claim for exemption because of an alleged false statement but solely because his name did not appear upon the certified official list. This denial made on this basis is clearly arbitrary and capricious. It cannot be whitewashed by a belated charge of lying made by the Government.

It is difficult, if not impossible, to reconcile the attitude of the Government as to the ministerial status of petitioner in this case with its attitude shown toward the claim of Dodez to exemption as a minister in the companion case. The facts in respect to their ministerial status and activity are almost identical in every respect. In the *Dodez* case the Government says that "there lurks in this case a close

question concerning the factual foundation upon which the board's classification" was made. (See Government's brief, page 16, *Dodez* v. *United States*, No. 86, October Term 1946.)

Gibson was born in September 1922. Dodez was born in September 1922. Gibson registered on June 30, 1942. Dodez registered on June 30, 1942. Gibson was classified on November 6, 1942. Dodez was classified on October 26, 1942. Gibson had formerly been a farmer until 1940 when he undertook the full-time pioneer missionary evangelistic work for the Society. Dodez had formerly been a farmer until 1942 when he undertook the full-time pioneer *missionary evangelistic* work for the Society. Gibson, except for a brief period of suspension, had engaged in the full-time pioneer missionary work for about two years before Dodez entered such work. Gibson filed with his draft board a sworn certificate issued by the Society in July, 1941, that he was a duly ordained and fully recognized minister. (Exhibit 29) Dodez filed with his draft board the identical certificate issued by the same Society in September, 1942. (Record p. 157) Gibson became a full-time pioneer minister almost two years before he filed his Questionnaire. Dodez became a full-time pioneer minister a little over two months before he filed his Questionnaire. Gibson's name was dropped from the list. The National Headquarters refused to add Dodez' name to the list. Gibson continued to act as a full-time pioneer minister from the date of his registration under the Act to the time of his being ordered to report. Dodez continued to act as a full-time pioneer minister from the date of his registration under the Act to the time of his being ordered to report. Both Gibson and Dodez have continued to act as full-time fully recognized missionary evangelists and ministers of the Society and of Jehovah's witnesses since their prosecution under the Act to this date. Both men occupy and have occupied the same status with the Society and Jehovah's witnesses in the preaching work done by the organization.

Gibson here and now adopts the language of the Government used in its brief filed in the *Dodez* case as his suggestion to the Court as to what should be done: "If a new trial is had petitioner will have an opportunity to present squarely the question whether there is any foundation in the facts before the selective service boards for rejecting his claim to classification as a minister, in accordance with the standard of judicial review set forth in the *Estep* case." (Government's brief in *Dodez* case, pp. 16-17)

Conclusion

Petitioner respectfully submits that for the reasons above stated, and for the reasons disclosed in his main brief filed in this case, the judgment of the circuit court of appeals should be reversed and the case should be remanded to the district court for further proceedings not inconsistent with the opinion of the Court that may be written herein.

HAYDEN C. COVINGTON
Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1945

TAZE HAMRICK GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 93–95) is reported at 149 F. 2d 751.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 15, 1945 (R. 96). The petition for a writ of certiorari was filed on July 13, 1945, and was granted on October 22, 1945 (R. 101). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Petitioner claimed exemption from military service (1) as a minister of religion and (2) as a conscientious objector to all military service. His claim to exemption as a conscientious objector was recognized by his board of appeal and he was classified IV-E and was assigned to a Civilian Public Service Camp for work of national importance in lieu of military service. Five days after petitioner was accepted at the camp he permanently absented himself from the camp without authority. The principal question presented is whether in a prosecution under Section 11 of the Selective Training and Service Act for deserting from the camp he was entitled to show as a defense that he should have been classified as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set forth in Appendix A, *infra*, pp. 33–37. The Selective Service Regulations, in pertinent part, are set forth in Appendix B, *infra*, pp. 38–52.

STATEMENT

Petitioner was indicted (R. 2–3)[1] in the United States District Court for the District of South Dakota in one count charging a violation of

[1] The designation "R." refers to the transcript of the proceedings in the courts below, and the designation "Ex." to the volume of exhibits filed with the transcript.

the Selective Training and Service Act of 1940. The indictment alleged that pursuant to his claim that he was a conscientious objector to all war, petitioner was classified in IV–E and assigned to a Civilian Public Service Camp; that he reported and was enrolled in the camp; and that on August 28, 1944, he failed to comply with the Selective Service Regulations applicable to registrants assigned to Civilian Public Service Camps in that he permanently absented himself from the camp without authority, in violation of Section 11 of the Act. Having waived a jury trial (R. 29), he was convicted by the court and was sentenced to imprisonment for a term of five years (R. 24–25). Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment was affirmed (R. 96).

The evidence adduced at the trial, as to which there is no substantial dispute (see R. 29–30), consisted of pertinent documents in petitioner's Selective Service file and oral testimony which may be summarized as follows:

On June 30, 1942, petitioner registered under the Selective Training and Service Act of 1940, with Local Board A, El Dorado, Arkansas (R. 44–45, 64). On October 12, 1942, he filed with the board the Selective Service questionnaire (Ex. 1–8). In that document he stated, *inter alia,* that he was twenty years of age; that he had completed eight years of elementary school

and one year of high school; that from 1934 to 1940 he was a farm laborer; that he had been a minister of religion of the Jehovah's Witnesses sect since June 1938; that he was ordained September 9, 1938; and that he was a conscientious objector to war. At the same time, petitioner claimed classification as a conscientious objector by filing a special form for conscientious objectors (Ex. 37–40; R. 69, 76), in which he asserted conscientious objections to both combatant and noncombatant military service because of his religious beliefs.

On November 6, 1942, the local board by unanimous vote (Ex. 8) classified petitioner I–A (available for military service). He appealed to the board of appeal, and on May 8, 1943, that board by unanimous vote, recognizing petitioner's claim that he was conscientiously opposed to all warfare, classified him IV–E (conscientious objector to both combatant and noncombatant service) (Ex. 8). Petitioner was thereafter physically examined and found acceptable for service and he was thereupon ordered to report for work of national importance, as Section 5 (g) of the Act (*infra*, pp. 33–34) requires (R. 45, 69–70). The order stated that he had been accepted for work of national importance and that he was to report to his local board for transportation to Civilian Public Service Camp No. 57, Hill City, South Dakota (see *infra*, pp. 61–62); and it further advised petitioner that it was his duty "to

remain in the camp, and to perform your prescribed duties until such time as you are released or transferred by proper authority" (Ex. 10).

Consistently with the order, petitioner reported to the local board and was furnished transportation to the camp (R. 70). He arrived there on August 23, 1944, at which time he was assigned a bunk and was otherwise "enrolled" (R. 30, 33, 45; Ex. 10, 21; *infra* p. 17, fn. 8). He underwent the usual conditioning period for all enrollees (R. 35; see Ex. 23). On August 28 he was given the routine examination by the camp doctor which all new members of the camps receive and was found physically fit (R. 38, 70; Ex. 22). On the same date petitioner handed the camp director a letter (R. 38; Ex. 26–27) stating, *inter alia*, that he was a minister of religion and that he would refuse to perform work at the camp. In an interview with the camp director petitioner explained to him that he had reported to the camp "only to exhaust the administrative process" (R. 75). He was advised by the director that the Selective Service Regulations required him to remain at the camp but he left the camp on that day without permission and did not return (R. 39, 46, 77). In a subsequent statement to an F. B. I. agent, petitioner stated that he left the camp w th the intention of permanently remaining away from the camp and that he

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understood that by his conduct he was violating the Selective Service Regulations (R. 46).

Petitioner sought in defense to the indictment to show that he was a minister of religion and that the failure of the Selective Service System so to classify him demonstrated that he had been arbitrarily classified, in violation of the Fifth Amendment. His proffered proof, which was rejected by the trial court (see R. 48–59, 66–69), consisted of various documents in his Selective Service file and of independent testimony calculated to show that he was a regularly practicing minister of religion.

SUMMARY OF ARGUMENT

I

Petitioner's asserted defense, which the trial court rejected, that he should have been classified as a minister of religion, is irrelevant to the charge of the indictment that he deserted from a Civilian Public Service Camp of which he was a member. The Selective Service Regulations (sec. 653.12; see also secs. 652.11 (a), 652.14, 691.17) impose on every person classified IV–E and assigned to a Civilian Public Service Camp the unqualified duty to remain in the camp and perform work of national importance until he is lawfully released from the camp. The duty extends as well to a registrant who believes himself misclassified as it does to all others at the camp.

The policy underlying the regulations contemplates that a member of a Civilian Public Service Camp may undertake to challenge his selective service classification either by seeking administrative relief through the Director of Selective Service or by resorting to habeas corpus, but that he may not defy the Act and regulations. Its objective plainly is to require a registrant to proceed in an orderly manner and to avoid placing him in a position, such as petitioner's, whereby if his challenge is unsuccessful he must be sent to prison as a convicted felon.

As we show in the Argument, the policy of the regulations that a registrant may not defy the camp authorities because he is not satisfied with his classification is neither novel nor of substantial prejudice to petitioner. Having wilfully refused to perform the duties imposed upon him by the regulations, petitioner may not excuse that failure by urging that the duties ought not to have been imposed upon him. Until he was lawfully relieved of his duties, it was his obligation to perform them.

II

The only act for which petitioner was prosecuted—deserting from a Civilian Public Service Camp—occurred at the camp when petitioner left the camp without authority. Applying the established rule that in the absence of a specific venue provision in the statute involved, venue shall be

laid in the district in which the criminal act occurred, there can be no question that petitioner was properly prosecuted in the District of South Dakota where the Civilian Public Service Camp is located. *United States* v. *Johnson*, 323 U. S. 273, relied upon by petitioner as requiring that he should have been prosecuted in the district in which his local board is located, was concerned with the question of venue when the criminal act extends beyond the confines of one judicial district; in this case the criminal act occurred only in the district in which petitioner was prosecuted.

I

HAVING BEEN ACCEPTED AS A MEMBER OF THE CIVILIAN PUBLIC SERVICE CAMP TO WHICH HE WAS ASSIGNED, PETITIONER HAD THE DUTY TO REMAIN AT THE CAMP AND TO PERFORM WORK OF NATIONAL IMPORTANCE UNTIL HE WAS LAWFULLY DISCHARGED. MISCLASSIFICATION IS NO DEFENSE TO A PROSECUTION FOR HAVING FAILED TO PERFORM THAT DUTY

This case presents a novel aspect of the question whether a selective service registrant may challenge the propriety of his selective service classification as a defense to an indictment charging that he knowingly failed to perform a duty required of him by the Selective Training and Service Act or the Selective Service Regulations. In *Falbo* v. *United States*, 320 U. S. 549, the Court held that misclassification was no defense for a registrant who was classified I–A (available for military service) and who failed to report for induction, or for a registrant who [illegible] classified

IV–E (conscientious objector to both combatant and noncombatant military service) and who failed to report for work of national importance. In *Smith* v. *United States*, No. 66, and *Estep* v. *United States*, No. 292, the Court has under consideration the question whether misclassification is a defense for a registrant who refused to submit to induction into the armed forces. This case presents a third category, namely, whether a registrant who has been classified IV–E and who has reported to the Civilian Public Service Camp to which he was assigned and has been accepted by the camp director may challenge the propriety of his selective service classification in a prosecution for having thereafter deserted from the camp.[2]

Relying upon the reasoning advanced by the defendants in the *Smith* and *Estep* cases, petitioner urges that since he reported to the camp and was accepted by the camp director, there can be no question that he fully completed the administrative process, and he argues that he therefore was entitled to challenge the propriety of his selective service classification in the criminal trial. We think he misconceives the nature of the problem presented by this case. The instant case, unlike the *Smith* and *Estep* cases, does not involve a pros-

[2] In *Billings* v. *Truesdell*, 321 U. S. 542, the Court found that the registrant had never been inducted into the Army and thus had no occasion to consider the nature of duties which would have been his if he had submitted to induction.

ecution for having refused to report for, or submit to, induction. Those cases would resemble the instant one only if Smith and Estep had submitted to induction and then deserted from the armed forces.

It is our belief that the trial court properly declined to permit petitioner to challenge his selective service classification, not because petitioner was for any reason not entitled to assert an otherwise valid defense, but because the asserted impropriety of the classification was not a defense to the offense charged against petitioner. As we shall demonstrate in the discussion which follows (see *infra*, pp. 18–27), the Selective Service Regulations impose on every person classified IV–E and assigned to a Civilian Public Service Camp the unqualified duty to remain in the camp and perform work of national importance until he is lawfully released from the camp. There is no condition precedent to the imposition of the duty that the registrant shall have been properly classified IV–E; rather, the duty extends to all registrants who, in the course of the Selective Service procedure, are classified IV–E and who have been assigned to a Civilian Public Service Camp. In our view, petitioner was free to seek his release from the camp administratively or to resort to habeas corpus, but under no circumstances was he free, in view of the duty imposed upon him, to desert from the camp. It is no defense to a

breach of the duty imposed by the Selective Service Regulations to demonstrate, as petitioner sought to do in the trial court, that he should have been classified differently.

1. *Petitioner's status under the Selective Service Regulations.*—Section 5 (g) of the Selective Training and Service Act (*infra*, p. 33) exempts from the obligation to perform military service all registrants found to be conscientiously opposed to both combatant and noncombatant military service, and it provides that "any such person claiming such exemption" shall, in lieu of induction into the armed forces, "be assigned to work of national importance under civilian direction." The Act does not create a Civilian Public Service Camp System but, instead, leaves the execution of the congressional policy to the President (sec. 5 (g)). And, it is to be noted, it contains no provisions relating to an induction procedure by which such persons are assigned to work of national importance, in contrast to the Bone Amendment (constituting the last two sentences of Section 11) in respect of inductees (see *Billings* v. *Truesdell*, 321 U. S. 542). The Civilian Public Service Camp System has been established by the Director of Selective Service (see Reg. 653.1–653.2) in the exercise, as the delegatee of the President (*infra*, pp. 59–60), of the power conferred on the President by Section 10 (a) (1) of the Act "to prescribe the necessary rules and regulations to carry out the provisions"

of the Act.[3] And the rights and duties of persons assigned to such camps are defined by the regulations promulgated by the director, regulations which have the force of law. *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 484.[4] Thus, petitioner's status, his rights and duties, are to be ascertained from the appropriate selective service regulations.

As we understand petitioner's position, he does not deny that by reporting to his local board and thereafter to the Civilian Public Service Camp to which he was assigned, as he was directed by the order of his local board, he became a member of the camp and was subject to the jurisdiction of the camp director. Indeed, he relies upon this

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[3] See, concerning the establishment of the camps, their functions, their membership, etc., the annual reports of the Director of Selective Service. *Selective Service in Peacetime*, 1940–1941, pp. 185–201; *Selective Service in Wartime*, 1941–1942, pp. 252–272; *Selective Service as the Tide of War Turns*, 1943–1944, pp. 177–190.

[4] Attacks on the Civilian Public Service Camp System as being in violation of the Fifth and Thirteenth Amendments and as being unauthorized by the Selective Training and Service Act have been uniformly unsuccessful. *Roodenko* v. *United States*, 147 F. 2d 752 (C. C. A. 10), certiorari denied, 324 U. S. 860; *Kramer* v. *United States*, 147 F. 2d 756 (C. C. A. 6), certiorari denied, 324 U. S. 878; *Brooks* v. *United States*, 147 F. 2d 134 (C. C. A. 2), certiorari denied, 324 U. S. 878; *United States ex rel Zucker* v. *Osborne*, 147 F. 2d 135 (C. C. A. 2), certiorari denied, June 18, 1945; see also the Briefs for the United States in Opposition in *Gormly* v. *United States*, No. 220, October Term, 1943; *Kramer* v. *United States*, No. 1034, October Term, 1944; *Roodenko* v. *United States*, No. 947, October Term, 1944.

fact to demonstrate that he indisputably completed the administrative process. Notwithstanding the fact that the parties thus are not in dispute as to this material proposition, we deem it advisable to describe the procedural steps by which petitioner's status changed from that of a registrant subject to the jurisdiction of his local board to that of a "campee" under the jurisdiction of the camp director and subject to the duties imposed upon "campees" by the selective service regulations. We do so particularly with a view to noting what we believe to be material differences in the selective service procedure applicable to a registrant ordered to report for induction into the armed forces and that applicable to one ordered to report for work of national importance, and also with a view to noting the respects in which the procedure which applies to this case differs from that which was applicable to *Falbo's* case.

If a registrant is classified IV-E (conscientious objector to both combatant and noncombatant military service), the procedure, as it existed when petitioner was ordered to report, by which he becomes a member of a Civilian Public Service Camp is as follows: When the registrant's order number is reached in the process of selecting registrants to report for induction into the armed forces, he is summoned for a final-type preinduction physical examination in the same manner

as that conducted for men selected for military service (Reg. 629.1–629.2).[5] If the report of the examination indicates that he is physically and mentally qualified for service, he is issued a Certificate of Fitness (Reg. 629.32). It is after this point that the procedure relating to a registrant classified IV–E differs from that relating to a registrant classified I–A. In the case of the latter, the local board thereafter orders him to report for induction. When he reports to the local board he is transported to the induction station where he is again physically examined, and if he is found acceptable he undergoes the induction ceremony (see Brief for the United States, p. 14, in the *Smith* case, No. 66).

In the case of a registrant classified IV–E, when he receives his Certificate of Fitness his final acceptability has been ascertained. Thereafter, he is assigned to a Civilian Public Service Camp by the Director of Selective Service (Reg. 652.1–652.2). The local board then issues its Order to Report for Work of National Importance, at which point it becomes the registrant's duty "to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and

[5] The text of each of the provisions of the Selective Service Regulations to which reference is made is set forth in Appendix B, *infra*, pp. 38–52.

in the manner provided by law" (Reg. 652.11). As soon as the registrant leaves his local board en route to the camp, he is "under the jurisdiction of the camp to which he is assigned" (Reg. 652.13), and if he fails to report to the camp or if he reports and thereafter absents himself from the camp without authority he is a "deserter" (Regs. 653.12, 691.17 (a) (c)). If the registrant reports to the camp, he is accepted by the camp director, who is required to accept all registrants who are assigned to his camp. During the registrant's first few days at camp he receives a routine examination by the camp doctor, but the outcome of the examination bears no relation to the registrant's acceptance at the camp (Reg. 653.11 (c)).[5] It is in this latter respect that the procedure differs from that which prevailed at the time of *Falbo's* case. At that time it was possible for a registrant to be rejected upon examination at the camp (see 320 U. S. at

[5] We are unable to agree with petitioner (Br. 17) that it is necessary for a registrant to undergo the physical examination at the camp "in order to finalize and complete his acceptance at the camp." Since every registrant who has passed his preinduction physical examination and is assigned to a camp by the Director of Selective Service must be accepted at the camp (Reg. 653.11 (c)), it is plain that the examination at the camp is not a part of the process of determining the registrant's acceptability. Indeed, in petitioner's case, he was accepted at the camp several days before he was examined by the camp doctor (see fn. 8, p. 17, and pp. 53–58, *infra*).

553) and the procedure thus paralleled the procedure for inducting men into the armed forces.[7]

Unlike the procedure which prevails for registrants going into the armed forces (see *Billings* v. *Truesdell*, 321 U. S. 542, 553–554), in the case of a registrant assigned to a Civilian Public Service Camp there is no induction process. The reason for the difference in procedure may be found in the fact that only a registrant who has claimed exemption from military service because he is conscientiously opposed to all war is classified IV–E and assigned to a camp. Section 5 (g) of the Act requires that any person "claiming such exemption" shall "be assigned to work of national importance." Since by asserting the claim the registrant necessarily acquiesces in his assignment to work of national importance, there is no occasion for an induction ceremony in which he will be able to choose between submitting to work of national importance and defying the Act.

As we have pointed out, the registrant becomes subject to camp jurisdiction as soon as he leaves his local board en route to the camp. Upon arrival at camp he is in all cases accepted by the

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[7] We have set forth in Appendix C, *infra*, pp. 53–58, a summary, prepared by the Selective Service System, of the historical background of Section 653.11 (c) of the Selective Service Regulations, which sets out the text of the provision at the time of *Falbo's* case and the present language of the provision, and which explains the reasons for the change in the procedure in this respect.

camp director, who is required to note that fact on DSS Form 221, the report of the preinduction physical examination which is forwarded by the local board to the camp (Reg. 653.11 (c)),[8] and he thereafter is subject to the duties imposed on all members of the camp (Reg. 653.12).

The facts set forth in the Statement, *supra*, pp. 3–6, demonstrate that this procedure was followed in petitioner's case. After petitioner was classified IV–E, he underwent a preinduction physical examination and a final determination of acceptability was made. Thereafter, he was assigned to the Hill City, South Dakota, Civilian Public Service Camp by the Director of Selective Service (see Ex. 9), and on August 8, 1944, an order was mailed to him notifying him that he had been accepted for work of national importance and directing him to report to his local board on August 21, 1944, for transportation to the camp. He reported to the board and thereafter entrained for the camp. Under the Selective Service Regulations (Sec. 652.13), as soon as petitioner left the local board's office, he became subject to the jurisdiction of the camp. He ar-

[8] We have lodged with the Clerk of the Court a photostatic copy of DSS 221, which is a part of the records of the Selective Service System, and which recites that petitioner was accepted for work of national importance at the Hill City, South Dakota, Camp on August 23, 1944, the day on which he arrived at camp. Nothing in the record supports petitioner's statement (Br. 20) that he was not accepted at the camp until August 28, 1944.

rived at the camp on August 23, 1944, and was immediately "enrolled" (R. 30, 33; Ex. 10, 21, 23, 25; *supra*, p. 17). During the next few days he underwent a conditioning period and on August 28 he was physically examined by the camp doctor (see Ex. 22). It was at this point that petitioner wilfully deserted from the camp.

In our view, there can be no question under the regulations that when petitioner deserted from the camp he was subject to the jurisdiction of the camp and to the duties imposed on all members of the camp.

2. *Petitioner's duties.*—Throughout his brief petitioner argues this case as though he were charged with having failed to report for work of national importance in violation of the order of his local board, and to support his argument he relies upon the considerations advanced by the defendants in the *Smith* and *Estep* cases. Resort to the indictment demonstrates, however, that he has misconceived the nature of the prosecution. Rather than charging a failure to comply with an Order to Report for Work of National Importance, as petitioner seems to assume, the indictment recites facts showing that petitioner became a member of the Civilian Public Service Camp and it then alleges (R. 3) that he did

> unlawfully, wilfully, knowingly and feloniously fail and neglect to abide by the rules and regulations prescribed and established by the Director of the Selective Service

> System for the conduct of registrants assigned to civilian work of national importance in such Civilian Public Service Camps, in that he, the said defendant, did then and there, to wit: on or about the twenty-eighth day of August 1944, without authority and in violation of said rules and regulations leave and absent himself from said camp with intent on the part of him, the said defendant, to remain permanently away from said camp; * * * said defendant did then and there unlawfully, wilfully, knowingly, and feloniously, fail, neglect, and refuse to remain at said Civilian Public Service Camp No. 57 until lawfully transferred or released therefrom, * * *.

The indictment thus charges a failure to perform a duty different from the duty to comply with an order of the local board, as was charged in the *Falbo, Smith* and *Estep* cases; it charges that petitioner failed to perform his duty of remaining at the camp and working there until he was released. The Findings of Fact (R. 21–22) entered by the trial judge recognize this, for they recite that petitioner, in deserting from the camp, violated, in particular, Section 653.12 of the Selective Service Regulations. This provision defines the duty of a registrant classified IV–E and assigned to a Civilian Public Service Camp, as follows:

> Assignees shall report to the camp to which they are assigned; remain therein

> until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued from time to time by the Director of Selective Service.

See also Sections 652.11 (a), 652.14 and 691.17.

Since it is not open to dispute that petitioner was assigned to a Civilian Public Service Camp and was accepted by the camp director as a member of the camp, we submit that petitioner was obliged to comply with the duties imposed upon him by Section 653.12. This obligation, we think, is not conditioned on his having been properly classified IV–E, but instead extends to every registrant who becomes a member of a Civilian Public Service Camp in the course of the operation of the Selective Service System. The language of Section 653.12 is all inclusive and we think it correctly expresses the policy of the Selective Service System.

From the beginning, it has been the policy of the Selective Service System, as well as the Department of Justice, that registrants under the

Selective Training and Service Act are obliged to comply with the Act and regulations until they are lawfully relieved of that obligation. For that reason, we have urged that a registrant who fails to report for induction or who fails to submit to induction may not excuse his failure by showing that he was improperly classified. His remedy, we have argued, is to test his classification by complying with the order of the local board and then by resorting to habeas corpus. Since the Selective Service Regulations are the creation of the Director of Selective Service, it is thus to be expected that they should reflect this policy by requiring every "campee," regardless of his views as to the merits of his classification, to remain at the camp until he is lawfully released. Any other construction of Section 653.12 impels the anomalous conclusion that the consistent position of the Selective Service System that even a misclassified registrant must comply with the Act and regulations was not expressed in its regulations; it requires a construction which places the Director's regulations at war with the Director's policy.

Our view of petitioner's duty likewise finds support in other provisions of the Selective Service Regulations. We are advised by the Selective Service System that it is an established administrative practice that if a member of a camp believes that he was misclassified, he may request

the Director of Selective Service to intervene and to direct the local board to reopen his classification and consider the question anew.* Additionally, Section 691.17(d), relating to recalcitrant members of the camps, provides that if, after a registrant has become a member of a Civilian Public Service Camp, it appears that he may have been misclassified, the Director of Selective Service may take the necessary steps to have the classification reopened by the registrant's local board. Significantly, the Section provides further that if such a registrant fails to perform his duties at the camp, the Director "may report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended."

The policy, which the regulations reflect, that all registrants must comply with their duties under the Act and regulations until relieved of that obligation does not substantially prejudice the registrant. Since a registrant who has become a member of a Civilian Public Service Camp is subject to restraint by the camp director, he is always free to challenge the propriety of any

*At the time when petitioner was in the camp, Section 626.2 (b) provided that "After a registrant has left the local board for delivery pursuant to an order to Report for Work of National Importance (Form 50) the local board shall reopen and consider anew the classification of such registrant only upon the written request of the Director of Selective Service." This provision is presently found in Section 626.2–1 of the Regulations.

selective service action in an orderly manner by resorting to habeas corpus. See, *e. g., United States ex rel. Zucker* v. *Osborne,* 147 F. 2d 135 (C. C. A. 2), certiorari denied, June 18, 1945; *United States ex rel. Bodenstein* v. *Nichols,* 151 F. 2d 155 (C. C. A. 3). If he prevails, he is released without unnecessary delay. On the other hand, if he is unsuccessful, he remains in camp for the purpose of performing work of national importance, as the Act contemplates. Such a procedure does not unduly interfere with the orderly administration of the camp system and avoids the disadvantages of the procedure adopted by petitioner. The long delays incident to a criminal trial, during which the registrant performs no duties under the Act, are averted, and if the registrant is mistaken in his belief that he was misclassified, he is not convicted as a felon and sent to prison, where he performs no service under the Act.

Neither is the policy of the regulations novel. No one would suggest seriously that if petitioner had been inducted into the army he might lay down his arms and desert his post of duty because he had reason to believe that he should have been exempted from military service. Indeed, under the 1917 Act, which involved a somewhat different procedure, it was held that where the draft board which ordered a registrant to report had jurisdiction over him, defiance of the order constituted desertion even though the registrant was not

fairly heard by the draft board, for "Although based on irregular proceedings, it was not void. Until vacated, it was binding on the petitioner." *Ex Parte Romano,* 251 Fed. 762, 764 (D. Mass.); see also *Ex Parte Tinkoff,* 254 Fed. 912 (D. Mass.). Similarly, a registrant who was inducted could not thereafter desert and attack the validity of his induction upon court martial for desertion. *Ex Parte Kerekes,* 274 Fed. 870 (E. D. Mich.);[10] cf. *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876 (C. C. A. 8), in which the Court concluded that the registrant had never been inducted. This same view is represented by an analogous line of cases involving minors who unlawfully enlisted in the armed forces without the consent of their parents. While it was held that the parents might procure the release of their sons from military service by resorting to habeas corpus, the courts recognized

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[10] Under the 1917 Act, the Judge Advocate General repeatedly ruled that a plainly mistaken classification did not void the induction and, accordingly, the registrant was required to apply to the military for discharge. JAG 334.4, June 7, 1918; JAG 327.3, October 30, 1918, November 9, 1918. And an erroneous classification was held no defense in a court martial for desertion arising out of failure to report for induction. See C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912-1930), in which it was stated—

"* * * While it is true there was no direct evidence that the accused was registered or classified, the order to entrain and proceed to camp is established beyond all doubt. The order imports rightfulness and verity as against any assault in these proceedings." C. M. 122330, Choroshen; C. M. 114991, Aniki.)

that until the enlisted men were discharged, they were required to perform military duties; it was held that if the enlisted man was confined by the military authorities on a charge cognizable by a military court, habeas corpus would not lie until he had served any sentence imposed by the military court. *In re Scott,* 144 Fed. 79 (C. C. A. 9); *In re Carver,* 142 Fed. 623 (D. Me.); *Dillingham* v. *Booker,* 163 Fed. 696, 698 (C. C. A. 4); *United States ex rel. Laikund* v. *Williford,* 220 Fed. 291 (C. C. A. 2); see also, Manual for Courts-Martial United States (1928), p. 199.

This same policy is manifest in 18 U. S. C. 753h, which requires a person confined in a penal institution "by virtue of any process issued under the laws of the United States" to remain in confinement until properly released, even though the judgment pursuant to which he is confined might be declared void if attacked in habeas corpus." See *Bayless* v. *United States,* 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748; *United*

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[11] Petitioner (Br. 30) seeks to distinguish the jailbreaking cases on the theory that the prosecution is for violation of a statute prohibiting jailbreaking, while in this case the prosecution, in his view, is based "upon alleged defiance of an administrative order which is directly challenged in the proceedings." As we have shown, he misconceives the nature of this prosecution, for he is being prosecuted for having failed to perform the duties imposed on him by Section 653.12, duties which are not conditioned upon the validity of his selective service classification. Section 653.12 bears the same relationship to petitioner's case as does 18 U. S. C. 753h to the case of a jailbreaker.

States v. *Jerome,* 130 2d 514, 519 (C. C. A. 2), certiorari denied as to this point, 317 U. S. 606; *Aderhold* v. *Soileau,* 67 F. 2d 259 (C. C. A. 5). Likewise, as is pointed out in *Giese* v. *United States,* 143 F. 2d 633, 635 (App. D. C.), affirmed by an equally divided court, 323 U. S. 682:

> The law knows a number of situations in which, even in peacetime, the duty of the citizen to cooperate in effective law enforcement overrides his convenience. Thus, it is his duty to submit to arrest, upon a warrant valid on its face, even though the warrant may turn out later to be invalid. A citizen who resists arrest under such circumstances may subject himself to punishment for so doing, in spite of his complete innocence of the original accusation upon which the warrant was issued. So, also, one who is held upon a commitment, valid on its face, may be guilty of escape if he forces his way out of custody, even though the commitment, when properly challenged, may prove to be insufficient. Again, one who is a fugitive from a State in which he is unjustly accused of crime may, nevertheless, be subjected to extradition if the indictment and requisition are in proper form. And he may become guilty of a crime, under the federal law, merely by fleeing to another State to escape prosecution. * * *. In the present case, as in those used for comparison in this paragraph, there was legal process, valid on its face; namely, an order of appellant's local

board requiring him to report. In the present case, as in those used for comparison, a remedy was available—appropriate both as to time and purpose—to challenge the validity of the order. No more is necessary to satisfy the requirements of due process.

3. *The Government's position.*—Petitioner does not deny that he was a member of the Civilian Public Service Camp to which he had been assigned or that he deserted from it. His sole contention in this respect is that he had no duty to remain in camp because he was improperly classified by his local board. Assuming that a registrant who claims classification as a conscientious objector, as petitioner did, may thereafter challenge the propriety of his classification, it is our position that until the classification is vacated either administratively or by judicial order, the registrant is obliged to perform the duties imposed by the Selective Service Regulations on every person classified IV–E and assigned to a Civilian Public Service Camp. This, we think, is what the regulations require of the registrant as his part in the cooperative effort to wage war successfully. Since the duty defined by the regulations applies to all assignees at Civilian Public Service Camps and does not except from its reach a registrant who believes himself to have been misclassified, it was petitioner's duty to remain at the camp to which he was assigned and to perform

work of national importance. If he desired to challenge his classification, habeas corpus was an available and effective remedy. In the words of Mr. Justice Douglas, concurring in *Hirabayashi* v. *United States*, 320 U. S. 81, 109: "We need go no further here than to deny the individual the right to defy the law. It is sufficient to say that he cannot test in that way the validity of the orders as applied to him." Since petitioner's duty was to remain at the camp until he was lawfully released, it is no defense to urge that he should have been classified differently. For this reason, we think petitioner's tendered defense in the trial court was irrelevant and was properly rejected.

We are mindful of the fact that petitioner reported to the Civilian Public Service Camp to which he was assigned and then deserted from the camp because it was his belief that this was the appropriate procedure for testing the validity of his selective service classification. As we have shown, we think he was mistaken in the procedure which he adopted instead of applying for reclassification under the procedure outlined in Section 691.17 (d) of the regulations or for habeas corpus. Whatever may be the situation of a registrant who upon the final determination of his acceptability refuses to proceed further[10]—a question

[10] Petitioner would have been in this position if he had declined to proceed further after he had passed his preinduction physical examination and received a Certificate of Fitness from his local board.

which is now before the Court for decision in the *Smith* and *Estep* cases—petitioner is not within this category. By becoming a member of the camp he acquired new rights and duties and by deserting from the camp he purposely failed to perform those duties. In pursuing the course of conduct which he undertook petitioner assumed the risk that the legal advice upon which he relied was correct. If he was mistaken, his recourse is not to the courts, but to the clemency power of the President. "Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime." *Williams* v. *North Carolina,* 325 U. S. 226, 238.

II

VENUE WAS PROPERLY LAID IN THE JUDICIAL DISTRICT IN WHICH THE CIVILIAN PUBLIC SERVICE CAMP WAS LOCATED

Relying upon *United States* v. *Johnson,* 323 U. S. 273, petitioner urges that he should have been prosecuted in the Western District of Arkansas, where his local board is located, rather than in the District of South Dakota in which the Civilian Public Service Camp is situated. In his view (Br. —), "South Dakota was not the district where the controversy arose or where the order on which the indictment is based was issued."

The Selective Training and Service Act contains no venue provision. Accordingly, the venue of the offense charged against petitioner must

be fixed at the place where the criminal act occurred. Constitution, Art. III, § 2, cl. 3; *Haas* v. *Henkel*, 216 U. S. 462, 473. As we have shown, the offense charged against petitioner is that he knowingly refused to perform a duty required of him by the Selective Service Regulations, in that he deserted from the Civilian Public Service Camp in which he was enrolled. The camp is located in the District of South Dakota, and petitioner's offense occurred in that district when he departed from the camp without authorization. Since the act for which petitioner was indicted and convicted occurred in the district of the trial court, there can be no question that venue was properly laid in that district.

Petitioner, we think, fails to distinguish this case from those cases where a registrant is prosecuted for having failed to report for induction as ordered by his local board.[11] We agree that such a prosecution must be in the district in which the local board is located, for the offense

[11] In *United States* v. *Anderson*, No. 447, on direct appeal to this Court from the United States District Court for the Western District of Washington, the question is whether a registrant charged with having failed to submit to induction may be prosecuted in the district in which the induction station is located and in which the failure occurred or whether he should be prosecuted in the district in which his local board is located. The district court, we believe erroneously, thought that the Act and regulations contemplated that the prosecution should be had in the district in which the local board is located (60 F. Supp. 649).

is the failure to report to the local board and is, thus, committed in the district in which the local board is located. *United States* v. *Van Den Berg*, 139 F. 2d 654 (C. C. A. 7); *Humes* v. *Pescor*, 148 F. 2d 127 (C. C. A. 8); cf. *Rumely* v. *McCarthy*, 250 U. S. 283, 289. *United States* v. *Johnson, supra,* resembles this case only in the fact that a question of venue is involved in both. Since, as we have shown, the only act charged by the indictment to be unlawful occurred in South Dakota there is no question here, as there was in the *Johnson* case, of ascertaining venue for an offense which extends beyond the confines of one judicial district.

Apart from the technical legal considerations involved, the record shows that petitioner lived in Mississippi until 1940 (R. 59–60; that he was in Arkansas when he registered under the Selective Training and Service Act (R. 63–64); that he thereafter lived in Oklahoma for several months (R. 64–65); that he was in Illinois when he was ordered to report for work of national importance (R. 65); and that he was in Indiana when he was apprehended by the F. B. I. (R. 40, 65). On the basis of these facts, petitioner is hardly in a position to argue, as he does (Br. 38, 42), that only by laying venue in Arkansas can he be assured of a fair trial at the place of his home.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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DECEMBER 1945.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

The Selective Training and Service Act of 1940 as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; August 18, 1941, c. 362, 55 Stat. 626; December 20, 1941, c. 602, 55 Stat. 844; November 13, 1942, c. 638, 56 Stat. 1018, 50 U. S. C. Appendix 301–318) provided, in part, as follows:

> SEC. 5. " * * (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a)

(2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10. (a) The President is authorized

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the country or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The de-

cisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. * * *

* * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration

of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or, if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

APPENDIX B

SELECTIVE SERVICE REGULATIONS

605.51 *Forms made part of regulations.*—All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether heretofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement.

* * * * *

621.1 *Mailing questionnaires.*—(a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.

* * * * *

621.3 *Special Form for Conscientious Objector.*—A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objectors (Form 47) which, when filed, shall become a part of his Selective Service Questionnaire (Form 40). The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (Form 47).

* * * * *

622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

* * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rite, and ceremonies in public worship; and who customarily performs those duties.

* * * * *

622.51 *Class IV–E: Conscientious objector available for, assigned to, or released from work of national importance.*—(a) In Class IV–E shall be placed every registrant who would have been classified in Class I–A but for the fact that he

has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

(b) Upon being advised by the Director of Selective Service that a registrant who was inducted into the land or naval forces for military service will be discharged because of conscientious objections which make him unadaptable to military service, the local board shall change such registrant's classification and place him in Class IV–E. The Director of Selective Service shall assign such registrant to work of national importance under civilian direction.

(c) A registrant placed in Class IV–E who is assigned to and reports for work of national importance under civilian direction shall be retained in Class IV–E unless his reclassification into some other class is specifically authorized by the Director of Selective Service.

(d) A registrant placed in Class IV–E who has been separated other than by death from work of national importance under civilian direction shall be retained in Class IV–E unless his reclassification into some other class is specifically authorized by the Director. Each such registrant shall be identified in the manner provided in section 622.86–2, and shall not be available for reassignment to work of national importance under civilian direction without the specific authorization of the Director of Selective Service.

(e) A registrant placed in Class IV–E who has been separated by death from work of national

importance under civilian direction shall be retained in Class IV–E. (Each such registrant shall be identified in the manner provided in section 622.86.)

* * * * *

627.25 *Special provisions where appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal shall first determine whether the registrant should be classified in one of the classes set forth in section 623.21, in the order set forth, and if it so determines, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the United States district attorney for the judicial district in which the local board of the registrant is located for the purpose of securing an advisory recommendation of the Department of Justice, provided that in a case in which the local board has classified the registrant in Class IV–E or in a case in which the registrant has claimed objection to combatant service only and the local board has classified him in Class I–A–O, the board of appeal may affirm the classification of the local board, without referring the case to the Department of Justice. No registrant's file shall be forwarded to the United States district attorney by any board of appeal and any file so forwarded shall be returned, unless in the "Minutes of Other Actions" on the Selective Service Questionnaire (Form 40) the

record shows and the letter of transmittal states that the board of appeal reviewed the file and determined that the registrant should not be classified in one of the classes set forth in section 623.21.

(b) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal (1) that if the registrant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the board of appeal shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice.

* * * * *

629.1 *Who will be examined.*—(a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical

examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent, * * *.

* * * * *

629.2 *Order to report for preinduction physical examination.*—(a) In accordance with instructions of the Director of Selective Service, the State Director of Selective Service will issue to each local board a Call—Preinduction Physical Examination (Form 224)—specifying thereon the number of specified registrants to be delivered for preinduction physical examination and the time and place fixed for such delivery.

(b) The local board shall mail an Order to Report—Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I–A or Class I–A–O under the provisions of section 623.21 to fill each Call—Preinduction Physical Examination (Form 224) which it receives. In filling such calls, the local board, as far as practicable, shall first select volunteers, then nonfathers, and finally fathers, and within each group shall make such selections in sequence of order numbers without regard to whether the registrant has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken.

(c) The local board shall also mail an Order to Report—Preinduction Physical Examination (Form 215) to each registrant classified in Class IV–E when his order number is reached (without regard to whether he has requested or will request a personal appearance before the local

board and without regard to whether an appeal has been or will be taken) in the process of ordering Class I–A and Class I–A–O registrants to report for preinduction physical examination under the provisions of paragraph (b) of this section.

(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I–A, Class I–A–O, or Class IV–E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service.

(e) At the time the local board prepares the original Order to Report—Preinduction Physical Examination (Form 215), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (Form 53).

* * * * *

629.32 *Mailing Certificate of Fitness to registrant accepted or rejected.*—When a Certificate of Fitness (Form 218) indicates that a registrant has been accepted for the Army or the Navy or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40).

* * * * *

652.1 *Report of conscientious objector to Director of Selective Service.*—(a) When a registrant is classified in Class IV–E and his

classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired, and his order number is reached in the process of selecting Class I–A and Class I–A–O registrants to report for induction, the local board shall immediately notify the Director of Selective Service on Conscientious Objector Report (Form 48) that the registrant is available for assignment to work of national importance under civilian direction.

652.2 *Assignment by Director of Selective Service.*—(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall forward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local board other than the registrant's local board, the registrant's local board will be notified of such action so that appropriate notations may be made in its records.

* * * * *

652.11 *Preparation and distribution of Order to Report; delinquency of IV–E registrants.*—

(a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV–E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Original and the First Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Second Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service: Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

652.12 *Transportation to camp.*—(a) When a registrant in Class IV–E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian direction as is followed in the case of a registrant delivered for induction into the land or naval forces.

* * * * *

652.13 *Jurisdiction of local board while registrant is engaged in work of national importance.*—A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board

shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status.

* * * * *

653.1 *Work projects.*—(a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all projects is vested in the Director of Selective Service.

653.2 *Camps.*—(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a technical agency using funds provided by the Selective Service System

and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service.

* * * * *

653.5 *Communications concerning assignees.*—In no event will the camp director communicate with the local board or the State Director of Selective Service concerning assignees, but all such communications shall be directed to the Director of Selective Service, Washington, D. C.

* * * * *

653.11 *Reception at camps.*[1]—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the

[1] See Appendix C, *infra*, pp 51–55.

local board for filing in the registrant's Cover Sheet (Form 53).

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(d) Upon receiving notice that a registrant has been accepted for work of national importance,

the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

653.12 *Duties.*—Assignees shall report to the camp to which they are assigned; remain therein until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued from time to time by the Director of Selective Service.

* * * * *

691.17 *Discipline.*—(a) An assignee who fails to perform the duties outlined in § 653.12 or whose conduct amounts to a violation of local, State, or Federal criminal statutes or to violation of these regulations or camp rules issued under the authority of these regulations; or to a violation of furlough, liberty, or leave regulations, will be subject to such restriction of privileges, extra duty, reclassification under the Selective Service Regulations, or prosecution under the Selective Training and Service Act of 1940, as amended, as the case may warrant.

* * * * *

(c) If, after reporting to camp, an assignee departs or absents himself from the camp without authority, the Director of Selective Service

will be notified not later than the 11th day following such departure or absence. The Director of Selective Service may take the necessary steps to report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended. In addition, forfeiture of 3 days of furlough time for each day of unauthorized absence is mandatory.

(d) Refusal to work or perform other assigned duties, counseling or inciting others to refuse to work or perform assigned duties, or failure to abide by the rules and regulations promulgated by the camp director or the Director of Selective Service constitutes a violation of these regulations. A full and immediate report of any violation of such rules and these regulations will be made to the Director of Selective Service through regular channels. If the reported conduct indicates that the assignee may have been improperly classified, the Director of Selective Service may take the necessary steps to submit the information to the assignee's local board with a request that the assignee's case be reopened and his classification considered anew under the Selective Service Regulations or the Director of Selective Service may report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended.

APPENDIX C

DECEMBER 14, 1945.

The Honorable TOM C. CLARK
The Attorney General
Department of Justice
Washington, D. C.

(Attention: Mr. Irving Shapiro.)

DEAR SIR: In response to your request that you be furnished the historical background of paragraph (c) of section 653.11 of the Selective Service Regulations, you are advised as follows:

From March 16, 1942, until February 2, 1944, the mentioned paragraph (c) read as follows:

> If the assignee indicates that his physical condition has changed since his final type physical examination for registrants in Class IV–E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the Camp Director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service will be retained in the camp or hospitalized when necessary.

The above language was provided by Amendment No. 40, effective March 16, 1942 (7 F. R. 2093).

During the period between March 16, 1942, and January 10, 1944, there was no procedure for a preinduction physical examination for registrants

inducted into the armed forces. By Amendment No. 29, effective March 16, 1942 (7 F. R. 2091), the previous procedure of giving a physical examination by the armed forces prior to induction was discontinued. After March 16, 1942, registrants were forwarded to the induction station for their final armed forces physical examination, and if found acceptable by the armed forces, inducted at that time and simultaneously made members of the enlisted reserve and given orders to report seven (7) days later at a reception center.

Section 5 of Public Law 197, 78th Congress, approved December 5, 1943, made specific mandatory provisions for preinduction physical examinations for individuals.[2] This was translated administratively into a plan of mass preinduction examinations.

---

[2] The statute provided in this respect as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as 1-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

By Amendment No. 200 (9 F. R. 400–442), effective January 10, 1944, the present procedure for preinduction physical examination was established. Section 629.1 of Amendment No. 200 contained the following provision:

> (a) Every registrant before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless; (1) he signs a Request for Immediate Induction (Form 219), or (2) he is delinquent. * * *

The procedure for a preinduction physical examination by the armed forces was operative for conscientious objectors as well as registrants to be inducted into the armed forces. As a consequence of the new preinduction physical examination procedure, section 653.11 was amended by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, to read as follows:

> (a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).
>
> (b) The camp director shall, on the bottom of page 4 of the Original and First

Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(c) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

The language of the quoted Amendment No. 210 makes no provision for a physical examination of assignees when received at camps, and no such examination was therefore required. However, it was the practice at the camps to examine assignees in order to determine whether there had been any change in their physical condition since the preinduction physical examination.

Taking cognizance of the prevailing practice in the camps to examine assignees when received, Amendment No. 236 (9 F. R. 6207), effective June

7, 1944, amended paragraphs (b) and (c) of section 653.11 to read as follows:

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

Paragraphs (b) and (c) of section 653.11 were

amended to read in their present form by Amendment No. 290 (10 F. R. 2286), effective March 1, 1945.

We trust that the above information answers your inquiry.

For the Director:

(S) SMYSER F. NAGLE,
1st Lieutenant, JAGD,
Assistant Chief, Legal Division.

APPENDIX D

Executive Order 8675, 6 Fed. Reg. 831, issued February 6, 1941, and authorizing the Director of Selective Service to establish the Civilian Public Service Camp System provides, as follows:

> By virtue of the authority vested in me by the Selective Training and Service Act of 1940 (Pub. No. 783, 76th Cong.), it is hereby ordered as follows:
>
> 1. The Director of Selective Service, hereinafter called the Director, is authorized to establish, designate, or determine work of national importance under civilian direction to which may be assigned persons found under section 5 (g) of the Selective Training and Service Act of 1940 to be conscientiously opposed to participation in combatant and non-combatant training and service in the land or naval forces of the United States.
>
> 2. The Director shall make the necessary assignments to such work, shall determine the agencies, organizations, or individuals that may provide civilian direction thereof, and shall have general supervision and control over such work.
>
> 3. To the extent that he may deem necessary to carry out the provisions of this order, the Director may utilize the services of the Departments, officers, and agents of the United States; accept the services of officers and agents of the several states, territories, and the District of Columbia, and the subdivisions thereof; and accept

voluntary services of private organizations and individuals; and may obtain, by purchase, loan, or gift, equipment and supplies from Federal and other public agencies and private organizations and individuals, with or without advertising or formal contract.

4. The Director is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this order.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
February 6, 1941.

APPENDIX E

Order No. 57 of the Director of Selective Service (7 Fed. Reg. 7589) establishing Civilian Public Service Camp No. 57, to which petitioner was assigned, and providing for the performance of work of national importance at the camp provides, as follows:

HILL CITY PROJECT

Establishment for Conscientious Objectors

I, Lewis B. Hershey, Director of Selective Service, in accordance with the provisions of section 5 (g) of the Selective Training and Service Act of 1940 (54 Stat. 885) and pursuant to authorization and direction contained in Executive Order No. 8675 dated February 6, 1941, hereby designate the Hill City Project to be work of national importance, to be known as Civilian Public Service Camp No. 57. Said camp, located near Hill City, Pennington County, South Dakota, will be the base of operations for reclamation work in the State of South Dakota, and registrants under the Selective Training and Service Act of 1940, who have been classified by their local boards as conscientious objectors to both combatant and noncombatant military service and have been placed in Class IV–E, may be assigned to said camp in lieu of their induction for military service.

The work to be undertaken by the men assigned to Civilian Public Service Camp No. 57 will consist of the reclamation of

bridges, impounding dam, minor roads, clearing reservoir, and the fighting of forest fires, and shall be under the technical direction of the Bureau of Reclamation of the Department of the Interior insofar as concerns the planning and direction of the work program. The camp, insofar as camp management is concerned, will be under the direction of approved representatives of the National Service Board for Religious Objectors. Men shall be assigned to and retained in camp in accordance with the provisions of the Selective Training and Service Act of 1940 and regulations and orders promulgated thereunder. Administrative and directive control shall be under the Selective Service System through the Camp Operations Division of National Selective Service Headquarters.

LEWIS B. HERSHEY,
Director.

SEPTEMBER 23, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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CHARLES ELMORE CROPLEY

No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1946

TAZE HAMRICK GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

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BRIEF FOR THE UNITED STATES ON REARGUMENT

OPINION BELOW

The opinion of the circuit court of appeals (R. 93–95) is reported at 149 F. 2d 751. The findings of fact of the trial court are set forth at R. 20–22.

JURISDICTION

The judgment of the circuit court of appeals was entered June 15, 1945 (R. 96). The petition for a writ of certiorari was filed on July 13, 1945, and was granted on October 22, 1945 (R. 101). The case was argued before this Court on January 2, 1946, and on February 25, 1946, the Court entered an order restoring the case to the docket

for reargument before a full bench. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether petitioner was accepted at the Civilian Public Service Camp to which he reported.

2. If so, whether his acceptance bars the defense of alleged improper classification.

3. If the defense is not barred, did the admissible proof offered by petitioner show that there is no foundation in the facts before the board of appeal for its refusal to classify him as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 are set forth in Appendix A, *infra*, pp. 57–61. The pertinent Selective Service Regulations are set forth in Appendix B, *infra*, pp. 62–74.

STATEMENT

Petitioner was indicted (R. 2–3)[1] in the United States District Court for the District of South

[1] The designation "R." refers to the printed record, and the designation "Ex." to the volume of original exhibits which is also before the Court.

Dakota in one count charging a violation of Section 11 of the Selective Training and Service Act. The indictment alleged that pursuant to petitioner's claim that he is conscientiously opposed to both combatant and non-combatant training and service, he was classified IV–E and assigned to a Civilian Public Service Camp; that he reported to the camp and was duly enrolled in it; and that on August 28, 1944, he unlawfully deserted from the camp.

Petitioner waived a jury trial (R. 29). He made no effort at the trial to dispute the facts adduced by the Government showing his desertion from the Civilian Public Service Camp. Instead, he sought to show as a defense that he is a minister of religion and that the selective service boards arbitrarily denied his claim to classification as a minister. This defense was rejected (R. 48–59, 66–69), petitioner was found guilty (R. 23–24), and he was sentenced to imprisonment for five years (R. 24–25). The trial judge found as a fact (R. 21–22) that after having been classified IV–E and having been assigned to Civilian Public Service Camp No. 57, petitioner reported to the camp as he was directed by his local board; that he was enrolled in the camp on or about August 23, 1944; that he was given a "pre-induction medical examination, which examination showed him fit for * * * service"; and that on August 28, 1944, petifioner deserted from the

camp in violation of Section 653.12 of the Selective Service Regulations.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment was affirmed (R. 96).

The facts bearing on the issue of the lawfulness of petitioner's selective service classification are summarized in the Argument, pp. 45–49, *infra*. The other evidence at the trial may be summarized as follows:

At the outset of the trial, the parties stipulated (R. 30) that "this defendant, now on trial, was born in Meridian, Mississippi, on the 14th of September, 1922. He is now 22 years of age. He registered in September, 1942, with Local Board A, Union County, Eldorado, Arkansas. Immediately following his registration a selective service questionnaire was sent to him, on October 5, 1942. The questionnaire was returned to the local board on October 12, 1942. In that questionnaire he claimed to be a minister of religion, a minister of Jehovah Witnesses. On November 6, 1942, the local board classified him 1A. From that classification and on November 12, 1942, he appealed to the State Board of Appeal, which board classified him 4E. He was so notified. Other proceedings were had but the 4E classification was continued, and still remains. Acting on that classification, General Hershey, Director of the Selective Service System, on May 23, 1944, made an order, directed to the State Director of Illinois, to

whose jurisdiction the case of Taze Hamrick Gibson had been transferred by the board at Eldorado, Arkansas, assigning this defendant to Civilian Public Service Camp No. 57, at Hill City, Pennington County, South Dakota, and ordering that the proper local board make the necessary order to the defendant to report for work of national importance. The order to this defendant accordingly was made on August 8, 1944, ordering him to appear and report at the camp on August 21, 1944. He reported at the camp pursuant to that order, and was there enrolled on or about August 23, 1944."

It was established by other evidence that during the next five days petitioner underwent the usual conditioning period for all enrollees (R. 35; see Ex. 23). On August 28 he was given the routine examination by the camp doctor and was found to be physically fit (R. 38, 70; Ex. 22). On the same day, petitioner handed the camp director a letter (R. 38; Ex. 26–27) stating, *inter alia*, that he was a minister of religion and that he therefore refused to perform work at the camp. In an interview with the camp director petitioner explained to him that he had reported to the camp "only to exhaust the administrative process" (R. 75). The Camp Director advised him that the Selective Service Regulations required him to remain at the camp and that if he did not do so, he would be prosecuted and would be sent to

prison (R. 39, 74). Despite this admonition, petitioner left the camp on August 28, and he did not return (R. 39, 77). In a subsequent statement to an F. B. I. agent, petitioner stated that he left the camp and that he understood that by his conduct he was violating the Selective Service Regulations (R. 46).

SUMMARY OF ARGUMENT

I. There was no dispute in the lower courts concerning the question of petitioner's acceptance by the Civilian Public Service Camp, and the parties are agreed in this Court that petitioner was accepted by the camp on August 23, 1944, the day on which he reported to the camp.

II. Petitioner's acceptance bars the defense of alleged improper classification. The Selective Service Regulations (sec. 653.12; see also secs. 652.11 (a), 691.17) impose on every person classified IV–E and assigned to a Civilian Public Service Camp the unqualified duty to remain in the camp and perform work of national importance until he is lawfully released from the camp. The duty extends as well as to a registrant who believes himself misclassified as it does to all others at the camp. The policy underlying the regulations contemplates that a member of a Civilian Public Service Camp may undertake to challenge his selective service classification either by seeking administrative relief through the Director of Selective Service or by resorting to

habeas corpus, but that he may not defy the Act and regulations. Its objective plainly is to require a registrant to proceed in an orderly manner and to avoid placing him in a position, such as petitioner's, whereby if his challenge is unsuccessful he must be sent to prison as a convicted felon.

As we show in the Argument, the policy of the regulations that a registrant may not defy the camp authorities because he is not satisfied with his classification is neither novel nor of substantial prejudice to petitioner. Having wilfully refused to perform the duties imposed upon him by the regulations, petitioner may not excuse that failure by urging that the duties ought not to have been imposed upon him. Until he was lawfully relieved of his duties, it was his obligation to perform them.

III. Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed on the ground that the information contained in petitioner's selective service file, which he offered in evidence, plainly shows that there was foundation in the facts before the boards for rejecting petitioner's claim to classification as a minister. The file, which is before the Court, shows that notwithstanding the fact that petitioner informed his local board in October 1942 that he had been a

full-time minister since 1940, the Watchtower Society on January 8, 1942 requested the Director of Selective Service to remove petitioner's name from the list of ministers recognized by the Society. Because petitioner's name was removed from the list the local board refused to classify him IV–D. After petitioner was classified IV–E by the board of appeal, petitioner admitted to the local board that in the fall of 1941 he had not been a full-time minister. He claimed that he had since returned to the ministry, but he furnished nothing from the Watchtower Society showing that he was again recognized by the Society as a minister of religion. Bearing in mind the admitted falsity of petitioner's original statement to the board that he had been a full-time minister from 1940 to October 1942 when he registered, the action of the Watchtower Society in affirmatively withdrawing its recognition of petitioner as a minister, and the absence of evidence, other than petitioner's assertion, that petitioner was subsequently restored to status as a minister of religion by the Society, we think there was ample basis in fact for the boards' rejection of petitioner's claim.

ARGUMENT

This brief is submitted in response to the order of this Court on February 25, 1946, restoring the

case to the docket for reargument before a full bench and providing that

> On reargument special attention is directed to the question whether petitioner was accepted by the Civilian Public Service Camp and, if so, whether his acceptance bars the defense of the alleged improper classification.

I

PETITIONER WAS ACCEPTED BY THE CIVILIAN PUBLIC SERVICE CAMP TO WHICH HE REPORTED

Introductory.—Section 5 (g) of the Selective Training and Service Act (*infra*, pp. 57–58) exempts from the obligation to perform military service all registrants found to be conscientiously opposed to both combatant and noncombatant military service, and it provides that "any such person claiming such exemption" shall, in lieu of induction into the armed forces, "be assigned to work of national importance under civilian direction." The Act does not create a Civilian Public Service Camp System but, instead, leaves the execution of the congressional policy to the President (sec. 5 (g)). And, it is to be noted, it contains no provisions relating to an induction procedure by which such persons are inducted for work of national importance, in contrast to the Bone Amendment in Section 11, which provides that a selectee shall not be subject to trial by a military tribunal until he has submitted to induction (see *Billings* v.

Truesdell, 321 U. S. 542). The Civilian Public Service Camp System has been established by the Director of Selective Service (see Reg. 653.1–653.2) in the exercise, as the delegatee of the President (*infra*, pp. 81–82), of the power conferred on the President by Section 10 (a) (1) of the Act "to prescribe the necessary rules and regulations to carry out the provisions" of the Act and the power conferred by Section 10 (a) (2) to create such agencies as are necessary to the administration of the Act.[2] And the rights and duties of persons assigned to such camps are defined by the regulations promulgated by the director, regulations which have the force of law. *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 484.[3]

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[2] See, concerning the establishment of the camps, their functions, their membership, etc., the annual reports of the Director of Selective Service. *Selective Service in Peacetime*, 1940–1941, pp. 185–201; *Selective Service in Wartime*, 1941–1942, pp. 252–272; *Selective Service as the Tide of War Turns*, 1943–1944, pp. 177–199.

[3] Attacks on the Civilian Public Service Camp System as being in violation of the Fifth and Thirteenth Amendments and as being unauthorized by the Selective Training and Service Act have been uniformly unsuccessful. *Roodenko* v. *United States*, 147 F. 2d 752 (C. C. A. 10), certiorari denied, 324 U. S. 860; *Kramer* v. *United States*, 147 F. 2d 756 (C. C. A. 6), certiorari denied, 324 U. S. 878; *Brooks* v. *United States*, 147 F. 2d 134 (C. C. A. 2), certiorari denied, 324 U. S. 878; *United States ex rel. Zucker* v. *Osborne*, 147 F. 2d 135 (C. C. A. 2), certiorari denied, 325 U. S. 881; see also the Briefs for the United States in Opposition in *Gormly* v. *United States*, No. 220, October Term, 1943; *Kramer* v. *United States*, No. 1034, October Term, 1944; *Roodenko* v. *United States*, No. 947, October Term, 1944.

The Selective Service Procedure.—The procedural steps by which a registrant's status changes from that of a selectee to that of a "campee" differ in some respects from the procedure involved where the registrant is classified for military service, and the procedure differs in some respects from that which prevailed at the time of *Falbo's* case (320 U. S. 549) in respect of persons assigned to work of national importance. In order that the facts of this case may be viewed in their proper setting, it may be helpful to consider generally the procedure involved before turning to the facts.

If a registrant is classified IV–E (conscientious objector to both combatant and noncombatant military service), the procedure by which he becomes a member of a Civilian Public Service Camp, as it existed when petitioner was ordered to report, is as follows: When the registrant's order number is reached in the process of selecting registrants to report for induction into the armed forces, he is summoned for a final-type preinduction physical examination in the same manner as that conducted for men selected for military service (Reg. 629.1–629.2).[4] If the report of the examination indicates that he is physically and mentally qualified for service, he is issued a Certificate of Fitness (Reg. 629.32). It is after this point that the procedure

[4] The text of each of the provisions of the Selective Service Regulations to which reference is made is set forth in Appendix B, *infra*, pp. 62–74).

relating to a registrant classified IV–E differs from that relating to a registrant classified I–A. In the case of the latter, the local board thereafter orders him to report for induction. When he reports to the local board, he is transported to the induction station where he is again physically examined, and, if he is found acceptable, he undergoes the induction ceremony (see *Estep* v. *United States,* Nos. 292 and 66, decided February 4, 1946).

In the case of a registrant classified IV–E, when he receives his certificate of fitness, his final acceptability has been ascertained. Thereafter, he is assigned to a Civilian Public Service Camp by the Director of Selective Service (Reg. 652.1–652.2). The local board then issues its Order to Report for Work of National Importance, at which point it becomes the registrant's duty "to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law" (Reg. 652.11). As soon as the registrant leaves his local board en route to the camp, he is "under the jurisdiction of the camp to which he is assigned" (Reg. 652.13), and if he fails to report to the camp or if he reports and thereafter absents himself from the camp without authority he is violating the act and regulations (Regs.

653.12, 691.17 (a) (c)).[5] If the registrant reports to the camp, he is accepted by the camp director, who is required to accept all registrants who are assigned to his camp. During the registrant's first few days at camp he receives a routine examination by the camp doctor, but the outcome of the examination bears no relation to the registrant's acceptance at the camp[6] (Regs. 653.11 (b) (c)). It is in this latter respect that the procedure differs from that which prevailed at the time of *Falbo's* case. At that time it was possible for a registrant to be rejected upon examination at the camp (see 320 U. S. at 553) and the procedure thus paralleled the procedure for inducting men into the armed forces.[6]

Unlike the procedure which prevails for registrants going into the armed forces (see *Billings* v. *Truesdell*, 321 U. S. 542, 549–554), in the case of a registrant assigned to a Civilian Public Service Camp there is no formal induction ceremony. The reason for the difference in procedure may be found in the fact that only a registrant who

[5] In the case of a selectee assigned to military service, Section 11 of the act provides that he is subject to trial by court martial after he has been "actually inducted" for training and service under the act.

[6] We have set forth in Appendix C, *infra*, pp. 75–80, a summary, prepared by the Selective Service System, of the historical background of Section 653.11(c) of the Selective Service Regulations, which sets out the text of the provision at the time of *Falbo's* case and the present language of the provision, and which explains the reasons for the change in the procedure in this respect.

has claimed exemption from military service because he is conscientiously opposed to all war is classified IV–E and assigned to a camp. Section 5 (g) of the Act requires that any person "claiming such exemption" shall "be assigned to work of national importance." Since by asserting the claim the registrant necessarily causes his assignment to work of national importance, there is no occasion for an induction ceremony in which he will be able to choose between submitting to work of national importance and defying the Act. However, whatever may be the reason for the absence of an induction ceremony, the fact is that acceptance by the camp is accomplished by the Camp Director's noting the fact of acceptance on D. S. S. Form 221 (Reg. 653.11 (c), *infra*, p. 72). Thereafter the selectee is a member of the camp with the rights and duties of a person in that status.

Petitioner was accepted at the camp.—The procedure which we have outlined was followed in this case. After petitioner was classified IV–E, he was given a preinduction physical examination (see R. 37, Ex. 16–19), and he was issued a Certificate of Fitness (see Ex. 91). Thereafter he was assigned to the Hill City, South Dakota, Civilian Public Service Camp by the Director of Selective Service (see Ex. 9). On August 8, 1944, the local board ordered petitioner to report for work of national importance on August 21. That order (Ex. 10) provides, in pertinent part:

Having been found to be acceptable for work of national importance under civilian direction, you have been assigned to the Civilian Public Service Camp #57 located at Hill City, Pennington County, in the State of South Dakota.

You are ordered to report to the local board named above at 2:00 p. m. on the 21st day of August, 1944, where you will be furnished transportation and given instructions to proceed to the camp.

You are ordered to report to the camp pursuant to the instruction of the local board, to remain in the camp, and to perform your prescribed duties until such time as you are released or transferred by proper authority.

You will be examined at the camp for communicable diseases and instructed as to your duties.

Failure * * * to remain in the camp and perform your duties until released or transferred by your authority will constitute a violation of the Selective Training and Service Act of 1940, as amended, and may subject you to punishment by fine or imprisonment or both.

Consistently with the command of the local board's order, petitioner reported to the board on August 21 and he entrained for camp, arriving there on August 23. Under Section 652.13 of the Selective Service Regulations, petitioner became subject to the jurisdiction of the camp as soon as he left the local board's office on August

21. It was stipulated at the trial that petitioner was "enrolled" in the camp on August 23 (R. 30). During the next few days he underwent a conditioning period and on August 28 he was physically examined by the camp doctor, who found petitioner in satisfactory condition. It was after this that petitioner deserted from the camp.

Throughout the litigation there has been no dispute among the parties concerning the fact of petitioner's acceptance at the camp. In our view, the stipulation at the opening of the trial that petitioner was "enrolled" in the camp "on or about August 23, 1944" (R. 30) was intended to remove from the case any issue concerning petitioner's status as a member of the camp. Thus, the United States Attorney told the court that in his view the only disputed issue in the case was whether petitioner deserted the camp (R. 30–31). Petitioner's counsel suggested two additional issues: whether petitioner acted "knowingly" and whether the order to report was void because he is a minister (R. 31). He did not suggest that there was any factual dispute as to whether petitioner had been accepted at the camp or that the stipulation was not intended to include this factor in the term "enrolled." Similarly, at no time during the course of the trial did petitioner challenge the sufficiency of the Government's evidence on the ground that acceptance at the camp had not

been established. And neither in the circuit court of appeals nor in this Court did petitioner suggest that in fact he had not been accepted at the camp. Instead it was assumed throughout the proceedings, undoubtedly in reliance upon the stipulation, that when petitioner deserted, he was a full-fledged member of the camp.

In ordering this case restored to the docket for reargument before a full bench, this Court directed "special attention" to the question whether petitioner was accepted by the Civilian Public Service Camp. The parties, as we have said, are not in dispute as to this issue. There is no question that in compliance with the procedure established by the regulations, petitioner was accepted by the camp. So that the position of both parties on this aspect of the case is clear, counsel for petitioner and for the Government on July 2, 1946, stipulated the following facts:[7]

> 1. After petitioner reported to Civilian Public Service Camp No. 57 he was accepted by the camp for work of national importance.
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> 2. His acceptance was noted by the camp director on page 4 of D. S. S. Form 221 and that form was forwarded to the Director of Selective Service in accordance

[7] The stipulation and the exhibit attached to it have been filed with the Clerk.

with the procedure prescribed by the Selective Service Regulations.[8]

3. The attached photostatic copy of D. S. S. Form 221, reciting that petitioner was accepted for work of national importance at C. P. S. No. 57 on August 23, 1944, is a true and correct copy of the D. S. S. Form 221 which the Director of Selective Service received from the ~~camp~~ director and which is presently contained in the official files of the Selective Service System.[9]

4. The parties were not in dispute in the District Court and in the Circuit Court of Appeals concerning petitioner's acceptance at the camp, and they are agreed in this

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[8] Section 653.11(c) provides that irrespective of the determination made upon physically examining the registrant at the camp, the camp director "shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a [the] registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned." The regulation further directs that the original of form 221 shall then be forwarded to the Director of Selective Service.

[9] At the bottom of page 4 of the form, the following appears: "Accepted for work of national importance at C. P. S. Camp No. 57. Place *Hill City, S. Dak.* Date *8-23-44*. Signature (*s*) *Paul G. Tschetter*, Camp Director."

In *Bowles* v. *United States*, 319 U. S. 33, this Court took judicial notice of three documents contained in the registrant's selective service file and, indeed, disposed of the case on the basis of the documents. Thus, even apart from the stipulation there would seem to be no question that the Court might take judicial notice of form 221 contained in the files of the Camp Operations Division of the Selective Service System and of the fact that it shows that petitioner was accepted at the camp on August 23, 1944.

Court that he was accepted by the Civilian Public Service Camp to which he was assigned.

The stipulated facts, we think, leave no room for question concerning petitioner's acceptance by the camp and bring into sharp focus the question whether the acceptance bars the defense of the alleged improper classification.

II

HAVING BEEN ACCEPTED AS A MEMBER OF THE CIVILIAN PUBLIC SERVICE CAMP TO WHICH HE WAS ASSIGNED, PETITIONER HAD THE DUTY TO REMAIN AT THE CAMP AND TO PERFORM WORK OF NATIONAL IMPORTANCE UNTIL HE WAS LAWFULLY DISCHARGED. MISCLASSIFICATION IS NO DEFENSE TO A PROSECUTION FOR HAVING FAILED TO PERFORM THAT DUTY

The issue.—In *Estep* v. *United States*, Nos. 292 and 66, decided February 4, 1946, this Court held, in considering the situation of selectees who had been found acceptable for service but who refused to submit to induction, that the provision of Section 10 (a) (2) of the Act making the classification of a selective service board "final" does not foreclose a registrant who has exhausted his administrative remedies from securing a judicial inquiry to determine whether the classifying board exceeded its jurisdiction. Since petitioner, by going one step further and becoming a member of the camp, concededly exhausted his remedies, there is no question in this case whether he was entitled to test the legality of his classification in the courts. The question which the case presents is a narrower one

relating to the method by which judicial inquiry is obtained. It is undisputed that so long as petitioner was at the Civilian Public Service Camp he was free to initiate a judicial inquiry into his selective service classification by resorting to habeas corpus. And we do not understand petitioner to dispute the fact that in such a habeas corpus proceeding he could have obtained the same judicial review which he would have secured if the trial court had permitted the defense of illegal classification in the criminal trial. The sole question in dispute is whether instead of resorting to habeas corpus petitioner was free to desert the camp for the purpose of instigating a criminal proceeding in which he might test the legality of his classification.

Stated briefly, it is the Government's view that the Director of Selective Service has required that, as in the armed forces, every member of a Civilian Public Service Camp shall remain at the camp until he is lawfully released. As a member of the camp, petitioner breached his duty of remaining at the camp by leaving without having been released either by order of the Director of Selective Service or by order of a court. It is no defense to a breach of that duty to show that if petitioner had proceeded in a lawful manner and had resorted to habeas corpus his classification would have been found to be unlawful. The offense here is leaving the camp without authority and that is an offense regardless of whether peti-

tioner was properly classified. Considerations of policy justify denying a member of a Civilian Public Service Camp the right to defy the law where, as in this case, an adequate and a less hazardous remedy is available to him if he remains at the camp and resorts to habeas corpus.

As we understand petitioner's position, he agrees that he was accepted at the camp and that he deserted from it. His sole contention is that he was improperly classified by his board of appeal and that he therefore had no duty to remain in the camp; that if he was illegally classified the camp director could not acquire jurisdiction over him.

Petitioner's Duty Under the Selective Service Regulations.—The trial court found (R. 22) as a fact that—

> Without any authority and in violation of the rules and regulations prescribed under the Selective Training and Service Act, and particularly Section 653.12 of the Selective Service Regulations, on August 28th, 1944, the defendant left the said camp permanently. He deserted the camp.

We think the finding is unassailable. When petitioner was accepted at the camp he acquired the same rights and duties as the other members of the camp. Section 653.12 of the Selective Service Regulations imposed on petitioner the duty, among others, to remain in the camp "until

released or transferred elsewhere by proper authority," and to perform his "assigned duties promptly and efficiently" (*infra*, p. 72). See also Sections 652.11 (a) and 691.17 (*infra*, pp. 67–68, 73–74), which complement Section 653.12.

Petitioner's argument (Br. 43–59) that he did not waive his rights by reporting to the camp misconceives the Government's position in this case. Plainly, a selectee who submits to induction or who is accepted by a Civilian Public Service Camp does not relinquish his right to challenge the validity of the administrative action. Since he acts under compulsion of law (see *Billings* v. *Truesdell*, 321 U. S. 542, 556), we think there can be no serious question that he does not waive his right to challenge his classification merely because he complies with the law. If petitioner had submitted to induction into the army he would have been able to do this by habeas corpus. The same remedy was available to him as a member of the Civilian Public Service Camp. Petitioner's argument overlooks the fact that by becoming a member of the armed forces or a Civilian Public Service Camp a selectee acquires a new status with new rights and duties. Among the duties imposed upon him is the duty not to desert. It is the acquisition of this duty rather than any theory of waiver which, in our view, forecloses a soldier or a member of a Civilian Public Service Camp from deserting with impunity on the ground that he should have been classified differently.

It is important to recognize the fact that petitioner's position in a habeas corpus proceeding would not be the same as it would be in a criminal proceeding. While resorting to habeas corpus he is in compliance with the law and he seeks a judicial determination of his legal rights. In the criminal proceeding he is before the court as one who has violated an applicable regulation of the Selective Service System. The trial has as its objective the determination of whether he knowingly violated the regulation. The propriety of his classification is not in issue, for the duty to comply with the regulation, as we shall show, extends to all who are members of the Civilian Public Service Camps, regardless of the correctness of their classifications.

Petitioner's argument (Br. 53–55) that if he is a minister of religion, there is no jurisdiction to compel him to remain in a Civilian Public Service Camp because ministers are exempt from service under the Act overlooks Section 10 (a) (2) of the Act. This provision lodges in the Selective Service boards exclusive power to hear and determine all claims for exemption from service under the Act. It may be assumed, *arguendo,* that there would be no power under the Act to detain in a camp a selectee who had been found to be exempt from service by the boards. But that is not this case. Petitioner was not found to be exempt from service, hence there is no basis for his argument in this respect. Until such time as the finding of the

boards that he was not exempt from service was set aside he was obligated to remain at the camp and to perform work of national importance. In this respect petitioner's position is no stronger than it would have been if he had been classified I-A and had submitted to induction into the armed forces. Section 11 of the Act contemplates that every registrant who submits to induction becomes subject to military jurisdiction, for it provides that after induction his violations of the Act may be tried by any military or naval court martial. No exception is provided for a person who submits to induction even though he believes he was misclassified. Under Section 11, if petitioner had submitted to induction into the armed forces his desertion thereafter would have been prosecutable in a military court martial regardless of whether his selective service board properly classified him. Induction involves a transfer of jurisdiction and the acquisition of new rights and duties by the inductee. See *Billings* v. *Truesdell*, 321 U. S. 542, 551–559.

The same is true in this case. When petitioner reported to the camp and was accepted by the camp director his status changed to that of a member of the camp. As a member, he acquired the same rights and duties as every other member of the camp, including the duty to remain at the camp until he was lawfully released.

Petitioner's argument overlooks, in our view, the settled doctrine in the law that in cases of

compelling public necessity the individual may be required to comply with the law until his rights are determined by the courts. *Yakus* v. *United States*, 321 U. S. 414, is an example of the application of this doctrine in another context. Other examples are enumerated in *Giese* v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed by an equally divided Court, 323 U. S. 682. Perhaps the clearest example of the application of this doctrine is in respect of the armed forces. We doubt that if petitioner had been inducted into the armed forces, he would have been entitled thereafter to lay down his arms and desert his post of duty because he believed that he should have been classified as a minister of religion. Quite clearly, it would have been his duty to comply with the regulations of the armed forces until such time as he was lawfully released from the military service. It is well established in practice that if a soldier seeks to challenge the exercise of military jurisdiction over him the appropriate procedure is to resort to habeas corpus. See e. g., *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Stingle's* case, Fed. Cas. No. 13458 (E. D. Pa); *Arbitman v. Woodside*, 258 Fed. 441 (C. C. A. 4); *Cramer* v. *France*, 148 F. 2d 801 (C. C. A. 9); *United States ex rel. Philips* v. *Downer*, 135 F. 2d 521 (C. C. A. 2); *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C. C. A. 2), certiorari denied, 323 U. S. 795; *Ex Parte Stanziale*, 138 F. 2d 312 (C. C. A. 3),

certiorari denied *sub. nom. Stanziale* v. *Paullin*, 320 U. S. 797; *Harris* v. *Ross*, 146 F. 2d 355 (C. C. A. 5); *Benesch* v. *Underwood*, 132 F. 2d 430 (C. C. A. 6); Cf. *Billings* v. *Truesdell*, 321 U. S. 542.

And it has been held in habeas corpus that a registrant who was inducted into the armed forces under the 1917 Act could not desert and thereafter seek to escape the consequences of his desertion by contending that he was in fact exempt from military service and should not have been inducted. *Ex Parte Kerekes*, 274 Fed. 870 (E. D. Mich.); *Ex Parte Tinkoff*, 254 Fed. 912 (D. Mass.); *Ex Parte Romano*, 251 Fed. 762, 764 (D. Mass.);[10] Cf. *Ver*

[10] Under the 1917 Act, the Judge Advocate General repeatedly ruled that a plainly mistaken classification did not void the induction and, accordingly, the registrant was required to apply to the military for discharge. JAG 334.4, June 7, 1918; JAG 327.3, October 30, 1918, November 9, 1918. And an erroneous classification was held no defense in a court martial for desertion arising out of failure to report for induction. See C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912–1930), in which it was stated—

"* * * While it is true there was no direct evidence that the accused was registered or classified, the order to entrain and proceed to camp is established beyond all doubt. The order imports rightfulness and verity as against any assault in these proceedings." (C. M. 122330, Choroshen; C. M. 113991, Aniki.)

We are advised by the War Department that its present position is reflected by a decision of the Board of Review No. 1 on December 11, 1944 (C. M., E. T. O. 4820, Skovan). In that case, the specification against the accused charged that while en route to join his company as a replacement the accused misbehaved himself before the enemy by refusing to go forward and join his company. The evidence showed that the accused expressly refused to go forward because he

Mehren v. *Sirmyer*, 36 F. 2d 876 (C. C. A. 8), in which the registrant was ordered discharged from military custody because it was determined that he never had been inducted.

This same view is represented by an analogous line of cases involving minors who unlawfully enlisted in the armed forces without the consent of their parents. While it was held that the parents might procure the release of their sons from military service by resorting to habeas corpus, the courts recognized that until the enlisted men were discharged, they were required to perform military duties; it was held that if the enlisted man was confined by the military authorities on a charge cognizable by a military court habeas corpus would not lie until he had served any sentence imposed by the military court. *In re Scott*, 144 Fed. 79 (C. C. A. 9); *In re Carver*, 142 Fed. 623 (D. Me.); *Dillingham* v. *Booker*, 163 Fed. 696, 698 (C. C. A. 4); *United States ex rel. Laikund* v.

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claimed that he was a conscientious objector. After considering the nature of the accused's beliefs and the proceedings before the Selective Service System, the Board of Review stated:

"Although the Board of Review has deemed it proper and advisable in this case to give serious consideration to accused's defense, it is not the intent hereby to imply that a soldier, regularly inducted into and accepted by the military service, may in a military court defend a charge against him arising under the Articles of War on the ground that he was wrongfully inducted into the military service. Conversely the Board is decidedly of the opinion that the authorities above cited sustain the opposite principle. Strictly speaking the court should have excluded all of defense's evidence pertaining to accused's draft status as irrelevant to the issues."

Williford, 220 Fed. 291 (C. C. A. 2); see also, Manual for Courts-Martial, United States (1928), p. 199.

The doctrine upon which we rely finds support likewise in the construction which the courts have given section 9 of the Act of May 14, 1930, 46 Stat. 327 (18 U. S. C. 753h), which makes it an offense for a person confined in a federal penal institution to escape or attempt to escape from such custody. In *Aderhold* v. *Soileau,* 67 F. 2d 259 (C. C. A. 5), it was contended that a sentence for escape in violation of this statute was void because the original sentence under which the prisoner was detained was so uncertain as to be void. In an opinion by Judge Sibley, the Circuit Court of Appeals for the Fifth Circuit disposed of the contention as follows (p. 260):

> * * * If the sentence here in question to the Industrial Reformatory be so indefinite as that Soileau was entitled to be resentenced, he was bound to question it only by regular and legal means. A prisoner in a penal institution whose sentence is irregular or voidable may not for that reason, and before some court has so adjudged, defy his guards and run away. A difference of opinion might cause a death. Such a doctrine would set discipline at naught. The statute, 18 USCA § 753 (h), forbids escape, not only to those "properly in the custody of the Attorney General" but also to all "who are confined

> in any penal or correctional institution, pursuant to his direction," without mention of the propriety of the confinement. We are of opinion that attempts at escape from such institutions are thereby forbidden to all inmates, and that, if they consider their confinement improper, they are bound to take other means to test the question.

To the same effect see *United States* v. *Jerome,* 130 F. 2d 514, 519 (C. C. A. 2), certiorari denied as to this point, 317 U. S. 606; *Bayless* v. *United States,* 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748. Compare *Jones* v. *State,* 158 Miss. 366, and *Commonwealth* v. *Ashe,* 142 Pa. Super. 403, where it was held that prosecution for escape from prison while an appeal from a criminal conviction was pending is not foreclosed by the subsequent reversal of the conviction. In *Kelley* v. *Meyers,* 124 Ore. 322, the Oregon Supreme Court rejected the contention that justification for attempting to escape existed in the fact that it was claimed that the statute under which the prisoner was originally convicted was unconstitutional, the court suggesting that if the prisoner desired to test the constitutionality of the statute, his sole remedy would have been to resort to habeas corpus.

The doctrine illustrated by the examples set forth above underlies the requirement of Section 653.12 that a member of a Civilian Public Service

Camp shall remain at the camp until he is lawfully released. We do not understand petitioner to dispute the fact that Section 653.12 extends to every member of a camp, regardless of what he may think of his selective service classification, and we think there can be no serious question as to the scope of this provision. The language of the regulation is all-inclusive, for by the term "assignee" it extends to every person classified IV–E who is assigned to a Civilian Public Service Camp.

Other provisions of the Selective Service Regulations make it plain that the Director contemplated that some members of Civilian Public Service Camps might be dissatisfied with their classifications, for they provide machinery for reopening the classification administratively. Section 626.2 (b)[11] requires the local board to reopen the classification of a member of a camp whenever the Director of Selective Service so requests in writing. We are advised by the Selective Service System that on the basis of this power it is an established administrative practice that if a member of a camp believes he was misclassified, he may request the Director of Selec-

[11] At the time when petitioner was in the camp, Section 626.2 (b) provided that "After a registrant has left the local board for delivery pursuant to an order to Report for Work of National Importance (Form 50) the local board shall reopen and consider anew the classification of such registrant only upon the written request of the Director of Selective Service." This provision is presently found in Section 626.2–1 of the Regulations.

tive Service to intervene and to direct the local board to reopen the classification and consider the question anew. If it is made to appear that the registrant may have been misclassified, the Director grants the request and directs the local board to reopen the classification. If the board changes the classification from IV–E, the registrant is, of course, released from the camp. Additionally, Section 691.17 (d), relating to recalcitrant members of the camps, provides that if, after a registrant has become a member of a Civilian Public Service Camp, it appears that he may have been misclassified, the Director of Selective Service may take the necessary steps to have the classification reopened by the registrant's local board. Significantly, the section provides further that if such a registrant fails to perform his duties at the camp, the Director "may report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended."

Notwithstanding the Director's recognition of the fact that some registrants at Civilian Public Service Camps would be dissatisfied with their classifications, Section 653.12 contains no exception for such persons. Instead its terms bespeak the Director's policy that every member of a camp shall remain there until he is lawfully released.

The administrative necessity which underlies the requirement of Section 653.12 is a real one.

Successful administration of the camps would be difficult, if not impossible, if members of the camps were free to resort to self help whenever they believed they had a justifiable grievance. Experience has demonstrated that if a few persons successfully defy the constituted camp authorities others are encouraged to do so too, whether they have a justifiable grievance or not. Successful small-scale defiance of the camp authorities is apt to develop into large-scale defiance. Moreover, it should be noted that many members of Civilian Public Service Camps are engaged in work which is of importance to the public welfare. If any one of these persons were permitted to desert with impunity because he desired to test the legality of his selective service classification the consequences very likely would be as serious as the consequences incident to desertion from the armed forces. For example, some members of the camps have been assigned to the Office of Scientific Research and Development for experimental and research work in the field of medicine. Many have been assigned to public hospitals and institutions. Others have been assigned to agricultural tasks or to forest fire fighting responsibilities.[12] If any of these

[12] For a discussion of some of the projects to which members of Civilian Public Service Camps are assigned see the annual reports of the Director of Selective Service. *Selective Service in Peacetime*, pp. 196–201; *Selective Service in Wartime*, pp. 262–272; *Selective Service as the Tide of War Turns*, pp. 182–188.

individuals deserted, they might very well ruin an important and costly experiment; a hospital or parts of it might be left seriously understaffed, or other similar consequences might be anticipated if members of camps are not treated in the same manner as members of the armed forces to the extent that they are required to perform service under the Selective Training and Service Act until they are lawfully relieved of the duty. In short, we think that Section 653.12 is a proper exercise of the power, conferred on the President by Section 10 (a) (1) of the Act and delegated to the Director of Selective Service, to prescribe the necessary rules and regulations to carry out the provision of Section 5 (g) that in lieu of military service conscientious objectors shall be assigned to work of national importance.

Our view of the Selective Service Regulations does not mean that petitioner would have been denied access to the courts to test the legality of his classification or even that he would have been substantially prejudiced in any respect. Indeed, it accords him all that he sought in the criminal trial. Since a member of a camp is subject to restraint by the camp director, he is always free to challenge the legality of that restraint by resorting to habeas corpus. See, e. g., *United States ex rel. Zucker* v. *Osborne*, 147 F. 2d 135 (C. C. A. 2), certiorari denied, 325 U. S. 881; *United States ex rel. Bodenstein* v. *Nichols*, 151 F. 2d 155 (C. C. A. 3). Thus, for example, from

August 23, 1944, when petitioner was accepted at the camp, until he deserted petitioner might have instituted a habeas corpus action to inquire into the legality of his classification. If petitioner had done this, the writ would have issued within a matter of days (see 28 U. S. C. 454–461), the camp director would have made a return showing by what authority he exercised jurisdiction over petitioner, and an inquiry would have been had to determine the legality of petitioner's classification. If petitioner prevailed, he would have been discharged from the camp without delay. On the other hand, if the habeas corpus court rejected petitioner's contention, he would have been remanded to the camp to continue his service under the act.

Such a procedure would not have unduly interfered with the orderly administration of the camp system and it would have accorded petitioner everything he would have obtained in the criminal trial if the trial court had permitted his proffered defense.[13] At the same time it would not have

[13] We think that none of the considerations advanced by Mr. Justice Murphy, concurring in the *Estep* case, as demonstrating that in the situation of a registrant ordered to submit to induction into the armed forces habeas corpus as a remedy "may be quite illusory in many instances" (slip opinion, p. 12), are persuasive in the context of this case. As a member of the camp, petitioner was not under military jurisdiction and there was no summary court-martial procedure in the camp. Instead, substantial violations of the regulations are prosecuted in the civil courts pursuant to Section 11 of the Act. There is no suggestion in this case that peti-

entailed any of the disadvantages of the procedure adopted by petitioner. It seems clear from the *Estep* decision that the scope of judicial inquiry into the selective service classification would have been the same in habeas corpus as it would be in a criminal trial. And since petitioner waived a jury trial (R. 29) in the district court, it is plain that he did not foresee any advantage in trying his case before a jury. On the other hand, by deserting from camp and causing the institution of criminal proceedings petitioner was not in the position of one who was complying with the law until his rights were judicially determined. Instead he was in the position of having violated the Selective Service Regulations applicable to him. In contrast with the expeditious hearing in the habeas corpus court the criminal trial neces-

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tioner's religious or conscientious scruples made it impossible for him to resort to habeas corpus. Petitioner was required to do nothing more than maintain the status quo until a habeas corpus court considered his case. Since the desertion occurred in the District of South Dakota it is plain that either a criminal trial or a habeas corpus inquiry would be in the United States District Court for the District of South Dakota where the camp is located and where the offense occurred. See *United States* v. *Anderson*, No. 447, decided June 10, 1946. There would be no danger of a habeas corpus case becoming moot by the removal of petitioner to another district if available judicial remedies, such as a stay order, were pursued. And the long-standing policy of the Selective Service System that habeas corpus is the proper remedy for a registrant who believes he is illegally classified suggests that there is no real danger that selective service officials would fail to treat a habeas corpus petitioner with "sympathetic understanding" (*Estep* case, slip opinion, p. 12).

sarily involves issues other than the legality of the administrative action and it affords ample opportunity for delay. Even more important, however, than the time-consuming delays occasioned by a criminal proceeding is the fact that if petitioner were unsuccessful in his defense in the trial, he would not, as in habeas corpus, be remanded to the Civilian Public Service Camp to perform work of national importance. Instead, he would be a convicted felon who is sent to prison.

The availability to petitioner of the same judicial review by way of habeas corpus which he sought in the criminal trial demonstrates quite plainly that it was wholly unnecessary for petitioner to run the risk of violating the act and regulations for the purpose of challenging the legality of his selective service classification. It is clear, at least since *Yakus* v. *United States*, 321 U. S. 414, 444–446, that petitioner has no "right" to insist that the issue be tried in a criminal proceeding. For as the Court said in the *Yakus* case (at page 444), "there is no constitutional requirement that that test [of the validity of a price order] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here."

In taking the position which we have urged, we are mindful of the fact that petitioner reported to the Civilian Public Service Camp to which he

was assigned and deserted after he had been accepted at the camp, because it was his belief that this was the appropriate procedure for testing the validity of his selective service classification. As we have shown, we think he was mistaken in following the procedure he adopted instead of applying for habeas corpus or for reclassification under the administrative procedure which we have outlined. Whether his motive was good or bad the fact remains, however, that he admittedly became a member of the camp and by deserting from the camp he purposely failed to perform the duties imposed upon him. It is a permissible inference that petitioner acted on advice of counsel. For unadvised registrants ordinarily do not speak in terms of exhausting the administrative process, as petitioner did when he announced his plan to leave the camp (see R. 75). The camp director warned petitioner that if he deserted camp, he would be convicted and sent to prison (R. 39, 74). Despite the warning petitioner deserted. In these circumstances, we think he assumed the risk that the legal advice upon which he relied was correct. "Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime."[14] *Williams* v. *North Carolina*, 325 U. S. 226, 238.

[14] Petitioner's argument (Br. 64–68) that the trial judge improperly denied him the opportunity to prove that he did not have an evil motive is, we think, without merit. Section 11 of the Act provides for the punishment of anyone who "knowingly" fails to perform a duty required of him by the

If petitioner's conviction is affirmed, a measure of relief may still be available to him. Rule 35 of the Federal Rules of Criminal Procedure permits a trial court to reduce a sentence within 60 days "after receipt by the court of a mandate issued upon affirmance of the judgment." If, as we think, the rule applies to the affirmance of a judgment by this Court, this case may be an appropriate one for the granting of such relief. When petitioner was sentenced the trial judge was of the view that *Falbo* v. *United States*, 320 U. S. 549, clearly settled the law against petitioner. Developments since then make plain the fact that this is in reality a test case and that the applicable rule of law now must be determined by this

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Act or regulations. This Court recently had occasion to point out (see *Screws* v. *United States*, 325 U. S. 91, 96–97) that, "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." This is so, the Court said, even though "his motive was pure." In this case petitioner purposefully deserted the camp after having been warned of the consequences by the camp director. By doing so, he knowingly failed to perform a duty required of him by the Selective Service Regulations. The decisions relied upon by petitioner (Br. 65) do not aid him. Both the *Keegan* (325 U. S. 478) and *Okamoto* (152 F. 2d 905 (C. C. A. 10)) cases were concerned with the construction of the evasion provision of Section 11; neither holds that to act knowingly one must act with evil purpose. The *Murdock* case (290 U. S. 389) involved a construction of "willful" in another context. See *Screws* v. *United States*, *supra*, at p. 101.

Court for the first time. These developments, in our view, would justify the trial judge in reconsidering the sentence imposed upon petitioner, taking into consideration the time which petitioner already had served prior to his release on bail by this Court.[15]

III

IT AFFIRMATIVELY APPEARS FROM THE INFORMATION CONTAINED IN PETITIONER'S SELECTIVE SERVICE FILE, WHICH HE OFFERED IN EVIDENCE, THAT HIS SECT WITHDREW ITS RECOGNITION OF HIM AS A MINISTER OF RELIGION. THERE IS THUS FOUNDATION IN FACT FOR THE REFUSAL OF THE BOARD OF APPEAL TO CLASSIFY HIM AS A MINISTER OF RELIGION

Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed. For it plainly appears from the evidence tendered by petitioner in support of his claim that he was illegally classified *that his own sect had withdrawn its recognition of him as a minister* and that there is thus foundation in the facts before petitioner's

[15] On the first argument petitioner urged that venue was improperly laid in the District of South Dakota and that the case should have been tried in the district where his local board is located. The contention apparently has been abandoned on reargument. In any event the decision in *United States* v. *Anderson*, No. 447, October Term 1945, decided June 10, 1946, that prosecutions under Section 11 shall be in the district in which the offense occurs, notwithstanding the fact that the local board may be located in a different district, fully disposes of the contention.

board of appeal for the board's refusal to classify him as a minister of religion.[16]

There is no claim in this case that petitioner was denied any procedural rights. The sole contention advanced by petitioner in the trial court was that as a Jehovah's Witness he was a minis-

[16] While this Court has at times indicated a reluctance to consider the merits of a tendered defense when it does not have the benefit of the lower courts' determinations on the question, there are exceptional circumstances when it has departed from this practice. Thus, for example, in *Bowles* v. *United States*, 319 U. S. 33, the Court found it unnecessary to consider whether Bowles should have been permitted to defend on the ground that the classifying boards misconstrued the Act, because the Court concluded that the defense, if permitted, would not be a good one. In the concurring opinion in *Falbo* v. *United States*, 320 U. S. 549, 555, Mr. Justice Rutledge likewise considered Falbo's tendered defense and concluded that it was not meritorious. We think the lack of merit in petitioner's tendered defense is so evident that the same procedure should be followed in this case. As we show in the text, it is apparent from petitioner's selective service file, which he tendered in evidence (R. 48–55) and which is before this Court, that he will not be able to establish that there is no foundation in the facts before the selective service boards for their refusal to classify him as a minister. Thus, if a retrial becomes necessary, it is to be anticipated that a conviction will result and that petitioner again will be sentenced to imprisonment. He will receive no credit for the time he already has served and the time for computing his eligibility for parole and for conditional release will start anew with the commencement of the new sentence. In these circumstances, bearing in mind the plain inadequacy of the tendered defense, we submit, if the Court disagrees with our position in Part II of the Argument, that the Court dispose of the merits of the tendered defense at this time without requiring further proceedings in the district court.

ter of religion and that he had been improperly denied exemption from service; that the classifying boards acted arbitrarily and capriciously in refusing to classify him IV-D. In support of this contention petitioner offered in evidence the material contents of his selective service file (see R. 48–55). Additionally, he tendered *de novo* evidence concerning his alleged status as a minister of religion (R. 57–59, 66–69). All of this tendered evidence, including the documents from the file, are presently before this Court. In our view none of the offers of proof tendered the defense of misclassification, even assuming petitioner's right to defend on that ground. Cf. *Sunal* v. *Large*, No. 5490, decided July 29, 1946 (C. C. A. 4). For this reason alone we think the judgment should be affirmed.

In the *Estep* decision this Court (slip opinion, pp. 6–7) defined the standard to be applied in inquiring into the validity of a selective service classification as follows:

> The provision making the decision of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may

> be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

This means, in our view, that petitioner bore the burden in the district court of showing by his offers of proof that there is not any evidence in his selective service file to support the denial of his claim to ministerial classification. Patently, the *de novo* evidence offered by petitioner at the trial (R. 66–69) does not show that the classifying board's classification is without foundation in fact. The propriety of an administrative board's determination plainly cannot be tested by considering evidence concerning petitioner's alleged activities which was never adduced before the board and which, of course, was not considered by it in making the classification. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–187. Petitioner's *de novo* evidence would have been material only if it was for the court to inquire *de novo* into his ministerial status. The quoted language from the *Estep* decision conclusively, in our view, demonstrates that this is not the function of the courts. Since the *de novo* evidence had no probative value in considering the narrow question whether the classifying board acted in the teeth of all the evidence before it, we believe the trial judge properly excluded this evidence. See *Smith*

v. *United States,* No. 5487, decided July 29, 1946 (C. C. A. 4).

The remaining evidence relied upon by petitioner consisted of documents from his selective service file. If these documents showed that there is no foundation in fact for the denial of his ministerial claim they would have tendered the defense of misclassification. The difficulty with petitioner's offers of proof in this respect is that, as we shall show, they do not prove what he sought to establish—that all the evidence before the boards showed that he was a minister of religion.

Ministerial status.—To demonstrate to the selective service boards that he was an ordained minister of religion, as he claimed, petitioner was required to meet the standards of Section 622.44 (c) of the regulations as construed with respect to Jehovah's Witnesses by the Director of Selective Service in Opinion No. 14 (amended), promulgated November 2, 1942. Section 622.44 (c) (*infra,* p. 63) defines a duly ordained minister of religion as—

> a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties.

On June 12, 1941, the Director of Selective Service issued Opinion No. 14 and on November 2,

1942, he issued Opinion No. 14 (amended)."[17] The latter opinion was in effect during the period when petitioner was finally classified by his board of appeal. This opinion stated that Jehovah's Witnesses were considered to constitute a recognized religious sect and that certain members of the group "by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions." The opinion stated that a certified official list had been prepared which contained the names of those members of the sect whose activities made them eligible for classification as a minister of religion. In respect of persons whose names were not on the list the opinion explained that—

> It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same rela-

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[17] On June 7, 1944, this opinion was superseded by State Director Advice No. 213–B, which in turn, was amended on September 25, 1944; these do not substantially change the views expressed in Opinion No. 14 (amended). For a historical summary of the background of Opinion No. 14 and of its function, see the Brief for the United States, pp. 64–78, in *Falbo* v. *United States*, No. 73, October Term, 1943.

> tionship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

The question which this aspect of the case presents is whether the information in petitioner's selective service file, tested by these standards, required the board of appeal to find that petitioner was a minister.

The facts bearing on petitioner's final classification.—The pertinent facts relating to petitioner's selective service classification, as shown by the documents from his selective service file which were admitted or offered in evidence, may be summarized as follows:

Petitioner registered with Local Board A, Union County, Arkansas, and on October 12, 1942, he filed his selective service questionnaire (Ex. 1–8). In that document he stated that he was twenty years old; that he had completed eight years of elementary school and one year of high school; and that, in addition, he had attended and was still attending "Divinity School." In answer-

ing Series IV of the questionnaire concerning his "Present Occupation or Activity" he stated that he is a minister of religion; that he had four years experience in this work; and that his earnings consisted of contributions received from this work. In answering Series VI, relating to "Occupational Experience, Qualifications, and Preferences," petitioner stated that he had been a farm laborer from 1934 to 1940 and that he preferred "ministry work." In Series VIII, relating to the ministry, he stated that he had been an ordained minister of religion since 1938,[18] and that he is a student preparing for the ministry in a theological or divinity school. In Series X petitioner claimed exemption from military service as a conscientious objector. He requested classification in IV–D.

Petitioner also filed with the local board the special form provided for registrants asserting conscientious objections to military service. In that document (Ex. 37–40) he summarized his religious views concerning the use of force and he described his activities as follows: "I have part in our service meetings at least four times a month, and do preside at bible studies in the homes of people of good will, once a week. I give public expression daily, by going from house to house 'preaching this gospel of the Kingdom.'

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[18] In an Occupational Questionnaire (Ex. 31–32) filed with the local board in September 1942, petitioner informed the local board that he had been an ordained minister since May 21, 1940.

* * *." In addition, he stated that he became a member of the Jehovah's Witnesses sect in 1937 and that he was the leader of "Kingdom Hall of Jehovah's Witnesses" in El Dorado, Arkansas.

At the same time that he filed these documents petitioner filed a letter (Ex. 33–36) and other supporting exhibits. In the letter he said that he had been a full-time minister since 1940 and he described his ministerial activities as "going from house to house and throughout the villages." The other exhibits consist of a certification dated July 5, 1941, by the Watchtower Bible and Tract Society that petitioner is an ordained minister of religion (Ex. 29); an identification card furnished petitioner by the Watchtower Society (Ex. 30); a copy of Consolation magazine, No. 551, October 30, 1940, which explained the position of the sect in respect of a military draft; a copy of Consolation magazine, No. 569, July 9, 1941, which contained a list of Jehovah's Witnesses, including petitioner, who were recognized by the sect and by the Director of Selective Service as ministers of religion; and a booklet entitled "Neutrality," in which the neutral position of Jehovah's Witnesses to worldly governments is explained.

On November 6, 1942, the local board classified petitioner in I–A (see Ex. 8) because the records of the Selective Service System showed that the Director of Selective Service had been advised by

the Watchtower Society that petitioner was no longer entitled to be listed as a person entitled to classification as a minister of religion (see *supra*, pp. 44–45) (Ex. 44). Petitioner took an appeal (Ex. 8) and on November 12, 1942, he submitted a letter to the appeal board restating his claim to classification as a minister of religion (Ex. 41–42). On December 10, 1942, the board of appeal declined to classify petitioner as a minister of religion (Ex. 8) and it referred his file to the Department of Justice for a hearing on petitioner's claim that he is conscientiously opposed to war. The Hearing Officer recommended that petitioner be classified IV–E as a conscientious objector and on May 3, 1943, the board of appeal so classified petitioner (see Ex. 8).

On May 14, 1943, petitioner requested the local board to reopen his classification and in support of the application he submitted four affidavits by persons who affirmed that they had known petitioner for either "several" or "many" months and that they knew that he was an ordained minister of religion (Ex. 54–59). In a letter to the local board, petitioner explained that his name had been removed from the list of ministers recognized by the sect and the Selective Service System because, "For a time in the fall of 1941, I did not get to engage my full time as an ordained minister of Jehovah's Witnesses for reasons beyond my control. When it was necessary to revise the official list in December 1941, my

name was not included on the list but very shortly thereafter I returned to full time service of the preaching of the good news of God's Kingdom and have continued in unbroken service since that time." (Ex. 54.) On June 1, 1943, the local board unanimously declined to reopen the classification on the ground that the additional information submitted by petitioner did not warrant it (Ex. 60).

In the meantime petitioner requested the national office of the Selective Service System to intervene in his case (Ex. 62–65). The Director of Selective Service caused petitioner's selective service file to be forwarded to the national office (see Ex. 67–69) to determine whether the Director would take an appeal to the President on petitioner's behalf. After having "carefully reviewed the registrant's classification," national headquarters concluded that an appeal to the President was not necessary "in the national interest or to avoid an injustice" (Ex. 70). A similar request to the State Director of Selective Service thereafter also was denied (Ex. 76–78).

These facts, in our view, furnish ample foundation for the refusal of the board of appeal to classify petitioner IV–D. Among other things, they show (1) that petitioner admittedly furnished to the boards false information concerning the duration of his alleged activities as a full-time minister and (2) that he furnished no evidence from the Watchtower Society showing that at some

time after petitioner's name was removed from the list of ministers, at the society's request, he was restored to status by the society.

As we have shown, when petitioner registered with his local board, in October 1942, he submitted considerable information, including documents from the Watchtower Bible and Tract Society, to the effect that he had been a minister of religion since 1938. In his letter of October 10, 1942 (Ex. 33–36), petitioner stated that from 1938 to 1940 he had been a part-time minister and that from 1940 on he "entered into the full time service of the Lord." However, when the local board proceeded to classify petitioner, it found that although he originally had been listed as a minister, his name had been removed from the list as of January 1, 1942, more than ten months before petitioner registered with the local board (see Ex. 44). In instructions issued to all local boards[19] the Director of Selective Service had advised the boards that certain names, including petitioner's, were removed from the list "upon information received from the Watchtower Bible

[19] The instructions were contained in Local Board Release No. 100, issued February 20, 1942 (see Local Board Memoranda, Government Printing Office, 1945). The Director of Selective Service summarized the practice concerning the addition of names to the list and the deletion of names from the list. The memorandum was accompanied by a list of registrants, including petitioner, whose names were removed from

and Tract Society, on or about January 8, 1942."

Thus, it is plain that petitioner's representation that he had been a full-time minister beginning in 1940 and continuing through October 1942,

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the official list as of January 1, 1942. The text of the memorandum is as follows:

"1. Under date of June 25, 1941, we forwarded to all State Directors a list of Jehovah's Witnesses known as members of the 'Bethel Family' and as 'Pioneers,' to which reference was made in National Headquarters Opinion No. 14. That list, forwarded with Memorandum to All State Directors (I–170), was not forwarded to local boards, but the agencies of the Selective Service System were notified by State Headquarters that information with respect to any names claimed to be contained on such list was available through State Headquarters for Selective Service.

"2. Subsequent to June 25, 1941, application was made by the Watchtower Bible and Tract Society, publishers for Jehovah's Witnesses, that certain names be added to the list of June 25. Between June 25, 1941, and December 31, 1941, 25 names were added to the list, and the State Headquarters and local boards concerned were notified by letter from this office.

"3. Since June 25, 1941, and up to and including December 31, 1941, the names of a number of registrants were subject to deletion from this official list, and the deletion was made, upon information received from the Watchtower Bible and Tract Society, on or about January 8, 1942. We attach hereto for your information, a complete list of those persons whose names were contained on the original list of June 25, 1941, or were added to such list prior to December 31, 1941, but which have been eliminated by this Headquarters from the revised list of members of the Bethel Family and Pioneers of Jehovah's Witnesses.

"4. There is being forwarded to all State Directors of Selective Service the revised official list of members of the 'Bethel Family' and 'Pioneers,' approved and placed on file in this Headquarters on February 20, 1942. This is the cur-

when he registered with the local board, was false. For petitioner's sect, of its own volition, requested that his name be removed from the list of persons it regarded as full-time or substantially full-time ministers of religion.

It was with these facts before it that the board of appeal refused to classify petitioner as a minister. Plainly, the truthfulness of petitioner's representations to the board was properly open to doubt as a result of the conflict between his story and the action of the Watchtower Bible and Tract Society, to which he was responsible. In view of the action of the Watchtower Society, we have difficulty in understanding how the board

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rent edition of the list referred to in National Headquarters Opinion No. 14. This revised list will not be forwarded to local boards, but the agencies of the Selective Service System are advised that this list is on file in State Headquarters, and information concerning those names contained on the revised list will be made available by the State Director of Selective Service.

"5. From time to time in the future, upon application properly made and upon investigation, this Headquarters may determine that the circumstances warrant the adding of the names of certain individuals who are members of Jehovah's Witnesses to the revised official list on file in this office. In such cases, notice of the addition of such names will be given by letter to the State Director and the local board concerned. Likewise, in instances where application has been made and because of the fact that circumstances do not warrant the adding of a name to the revised official list, the State Director and local board concerned will be advised that the application has been denied."

could have reached any other conclusion than it did. It is beyond question that at the time that petitioner was finally classified his name was not on the list of ministers recognized by the society. Since the society had taken affirmative action to delete petitioner's name from the list and, thus, to withdraw its recognition of him as a minister, there was likewise no basis for finding that petitioner's status in his sect was the same as that of a minister in any other religious group and that he should have been classified in IV–D even though his name was not on the list. The board of appeal would have been justified in finding that the society's action constituted a denial of petitioner's status as a minister within the sect. In our view, the action of the society compelled the board to reject petitioner's claim to classification in IV–D.[20] That there was found tion in fact for the board's classification hardly seems debatable.

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[20] The circumstances concerning the absence of petitioner's name from the list differ in this case from cases like *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 638 (C. C. A. 7), where the court regarded the fact that the registrant's name never had been on the list as unpersuasive. This case does not involve a mere failure of the society to place petitioner's name on the list. In this case the society took affirmative steps to withdraw its recognition of petitioner as a minister by causing his name to be removed from the list. The significant fact is the society's action in causing the deletion of petitioner's name from the list, not the mere fact that his name was not on the list.

After the board of appeal had classified petitioner in IV–E as a conscientious objector, petitioner requested the local board in May 1943, to reopen his classification and for the first time he adverted to the absence of his name from the list. His explanation (see Ex. 54) was that in the fall of 1941 he had not devoted his full time to the ministry and that for this reason the society had caused his name to be deleted from the list. His effort to overcome this, however, by suggesting that shortly after December 1941, he returned to the full-time ministry was insufficient. For petitioner failed to explain why his name was not restored to the list by the society during 1942.[21] Even apart from this, however, the application to reopen the classification was inadequate for it failed to present any evidence, other than petitioner's assertion that he was a full-time minister, that petitioner had been restored to status as a full-time minister by the society.[22] Petitioner's assertions were not sup-

[21] We are advised by the Selective Service System that the practice of adding names to the list was not terminated until October 29, 1942. See also, Local Board Release No. 100, *supra*, pp. 50–52.

[22] The application to reopen the classification was accompanied by the affidavits of four persons (Ex. 54–59) who stated that they considered petitioner as a minister of religion. But once it is recognized that all Jehovah's Witnesses are regarded within the sect as ministers of religion, it becomes apparent that these affidavits furnished no basis for finding that petitioner had been restored to status as a full-time minister.

ported by documents from the Watchtower Society showing that the society again recognized him as a minister.

It was for the local board in the exercise of a reasonable discretion to determine whether to reopen petitioner's classification on the ground that new facts were presented which, if true, would justify a change in his classification.[23] Certainly, in the absence of a showing that petitioner had been restored to status by the society, there was no basis for reclassifying petitioner. In our view, the local board properly declined to reopen.

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[23] Section 626.2 (a) of the Selective Service Regulations provides:

"The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which; if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control."

That it did not act arbitrarily seems not open to question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SEPTEMBER 1946.

APPENDIX A

Statutory Provisions Involved

The Selective Training and Service Act of 1940 as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; August 18, 1941, c. 362, 55 Stat. 626; December 20, 1941, c. 602, 55 Stat. 844; November 13, 1942, c. 638, 56 Stat. 1018, 50 U. S. C. Appendix 301–318) provided, in part, as follows:

> Sec. 5. * * * (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with

the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10. (a) The President is authorized (1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the country or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in

accordance with such rules and regulations as the President may prescribe. * * *

* * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court

of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

APPENDIX B

SELECTIVE SERVICE REGULATIONS

605.51 *Forms made part of regulations.*—All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether heretofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement. (6 F. R. 6834.)

* * * * *

621.1 *Mailing questionnaires.*—(a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return. (6 F. R. 6606.)

* * * * *

621.3 *Special Form for Conscientious Objector.*—A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objectors (Form 47) which, when filed, shall become a part of his Selective Service Questionnaire (Form 40). The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (Form 47). (6 F. R. 6606.)

* * * * *

622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

* * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (6 F. R. 6610.)

* * * * *

622.51 *Class IV–E: Conscientious objector available for, assigned to, or released from work of national importance.*—(a) In Class IV–E shall

be placed every registrant who would have been classified in Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service. (7 F. R. 6517.)

* * * * *

629.1 *Who will be examined.*—(a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent, * * *. (9 F. R. 400.)

629.2 *Order to report for preinduction physical examination.*—(a) In accordance with instructions of the Director of Selective Service, the State Director of Selective Service will issue to each local board a Call—Preinduction Physical Examination (Form 224)—specifying thereon the number of specified registrants to be delivered for preinduction physical examination and the time and place fixed for such delivery.

(b) The local board shall mail an Order to Report—Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I–A or Class I–A–O under the provisions of section 623.21 to fill each Call—Preinduction Physical Examination (Form 224) which it receives. In filling such calls, the local board, as far as practicable, shall first select volunteers, then nonfathers, and finally fathers, and within each group shall make such selections in sequence of order numbers with-

out regard to whether the registrant has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken.

(c) The local board shall also mail an Order to Report—Preinduction Physical Examination (Form 215) to each registrant classified in Class IV–E when his order number is reached (without regard to whether he has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken) in the process of ordering Class I–A and Class I–A–O registrants to report for preinduction physical examination under the provisions of paragraph (b) of this section.

(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I–A, Class I–A–O, or Class IV–E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service.

(e) At the time the local board prepares the original Order to Report—Preinduction Physical Examination (Form 215), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (Form 53). (9 F. R. 400.)

* * * * *

629.32 *Mailing Certificate of Fitness to registrant accepted or rejected.*—When a Certificate of Fitness (Form 218) indicates that a registrant has been found acceptable for general military service or acceptable for limited military service

or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40). (9 F. R. 7494.)

* * * * *

652.1 *Report of conscientious objector to Director of Selective Service.*—(a) When a registrant is classified in Class IV–E and his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired, and his order number is reached in the process of selecting Class I–A and Class I–A–O registrants to report for induction, the local board shall immediately notify the Director of Selective Service on Conscientious Objector Report (Form 48) that the registrant is available for assignment to work of national importance under civilian direction. (9 F. R. 439.)

652.2 *Assignment by Director of Selective Service.*—(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall for-

ward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local board other than the registrant's local board, the registrant's local board will be notified of such action so that appropriate notations may be made in its records. (7 F. R. 4271.)

* * * * *

.652.11 *Preparation and distribution of Order to Report; delinquency of IV–E registrants.*— (a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV–E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Original and the First Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Second Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service:

Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law. (9 F. R. 439.)

* * * * *

652.12 *Transportation to camp.*—(a) When a registrant in Class IV-E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian di-

rection as is followed in the case of a registrant delivered for induction into the land or naval forces. (7 F. R. 112.)

* * * * *

652.13 *Jurisdiction of local board while registrant is engaged in work of national importance.*—A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status. (7 F. R. 112.)

* * * * *

653.1 *Work projects.*—(a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be

designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all projects is vested in the Director of Selective Service. (7 F. R. 247, 654.)

653.2 *Camps.*—(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a technical agency using funds provided by the Selective Service System and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service. (7 F. R. 248; 9 F. R. 6207.)

* * * * *

653.5 *Communications concerning assignees.*—In no event will the camp director communicate with the local board or the State Director of Selective Service concerning assignees, but all such communications shall be directed to the Director

of Selective Service, Washington, D. C. (7 F. R. 248.)

* * * * *

653.11 *Reception at camps.*[1]—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

[1] See Appendix C, *infra*, pp. 75–80.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(d) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100). (9 F. R. 1416, 6207.)

653.12 *Duties.*—Assignees shall report to the camp to which they are assigned; remain therein until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued from

time to time by the Director of Selective Service. (8 F. R. 4291.)

* * * * *

691.17 *Discipline.*—(a) An assignee who fails to perform the duties outlined in § 653.12 or whose conduct amounts to a violation of local, State, or Federal criminal statutes or to violation of these regulations or camp rules issued under the authority of these regulations, or to a violation of furlough, liberty, or leave regulations, will be subject to such restriction of privileges, extra duty, reclassification under the Selective Service Regulations, or prosecution under the Selective Training and Service Act of 1940, as amended, as the case may warrant.

* * * * *

(c) If, after reporting to camp, an assignee departs or absents himself from the camp without authority, the Director of Selective Service will be notified not later than the 11th day following such departure or absence. The Director of Selective Service may take the necessary steps to report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended. In addition, forfeiture of 3 days of furlough time for each day of unauthorized absence is mandatory.

(d) Refusal to work or perform other assigned duties, counseling or inciting others to refuse to work or perform assigned duties, or failure to abide by the rules and regulations promulgated by the camp director or the Director of Selective Service constitutes a violation of these regulations. A full and immediate report of any viola-

tion of such rules and these regulations will be made to the Director of Selective Service through regular channels. If the reported conduct indicates that the assignee may have been improperly classified, the Director of Selective Service may take the necessary steps to submit the information to the assignee's local board with a request that the assignee's case be reopened and his classification considered anew under the Selective Service Regulations or the Director of Selective Service may report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended. (9 F. R. 4862.)

* * * * *

APPENDIX C

DECEMBER 14, 1945.

The Honorable TOM C. CLARK,
The Attorney General,
Department of Justice, Washington, D.C.

(Attention: Mr. Irving Shapiro)

DEAR SIR: In response to your request that you be furnished the historical background of paragraph (c) of section 653.11 of the Selective Service Regulations, you are advised as follows:

From March 16, 1942, until February 2, 1944, the mentioned paragraph (c) read as follows:

> If the assignee indicates that his physical condition has changed since his final type physical examination for registrants in Class IV–E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the Camp Director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service will be retained in the camp or hospitalized when necessary.

The above language was provided by Amendment No. 40, effective March 16, 1942 (7 F. R. 2093).

During the period between March 16, 1942, and January 10, 1944, there was no procedure for a preinduction physical examination for registrants inducted into the armed forces. By Amendment No. 29, effective March 16, 1942 (7 F. R. 2091),

the previous procedure of giving a physical examination by the armed forces prior to induction was discontinued. After March 16, 1942, registrants were forwarded to the induction station for their final armed forces physical examination, and if found acceptable by the armed forces, inducted at that time and simultaneously made members of the enlisted reserve and given orders to report seven (7) days later at a reception center.

Section 5 of Public Law 197, 78th Congress, approved December 5, 1943, made specific mandatory provisions for preinduction physical examinations for individuals.[2] This was translated administratively into a plan of mass preinduction examinations.

By Amendment No. 200 (9 F. R. 400–442), effective January 10, 1944, the present procedure for preinduction physical examination was estab-

[2] The statute provided in this respect as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I–A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

lished. Section 629.1 of Amendment No. 200 contained the following provision:

> (a) Every registrant before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless; (1) he signs a Request for Immediate Induction (Form 219), or (2) he is delinquent. * * *

The procedure for a preinduction physical examination by the armed forces was operative for conscientious objectors as well as registrants to be inducted into the armed forces. As a consequence of the new preinduction physical examination procedure, section 653.11 was amended by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, to read as follows:

> (a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).
>
> (b) The camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for

work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(c) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

The language of the quoted Amendment No. 210 makes no provision for a physical examination of assignees when received at camps, and no such examination was therefore required. However, it was the practice at the camps to examine assignees in order to determine whether there had been any change in their physical condition since the preinduction physical examination.

Taking cognizance of the prevailing practice in the camps to examine assignees when received, Amendment No. 236 (9 F. R. 5207), effective June

7, 1944, amended paragraphs (b) and (c) of section 653.11 to read as follows:

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

Paragraphs (b) and (c) of section 653.11 were amended to read in their present form by Amendment No. 290 (10 F. R. 2286), effective March 1, 1945.

We trust that the above information answers your inquiry.

For the Director:

(S) SMYSER F. NAGLE,
1st Lieutenant, JAGD,
Assistant Chief, Legal Division.

APPENDIX D

Executive Order 8675, 6 Fed. Reg. 831, issued February 6, 1941, and authorizing the Director of Selective Service to establish the Civilian Public Service Camp System provides, as follows:

By virtue of the authority vested in me by the Selective Training and Service Act of 1940 (Pub. No. 783, 76th Cong.), it is hereby ordered as follows:

1. The Director of Selective Service, hereinafter called the Director, is authorized to establish, designate, or determine work of national importance under civilian direction to which may be assigned persons found under section 5 (g) of the Selective Training and Service Act of 1940 to be conscientiously opposed to participation in combatant and non-combatant training and service in the land or naval forces of the United States.

2. The Director shall make the necessary assignments to such work, shall determine the agencies, organizations, or individuals that may provide civilian direction thereof, and shall have general supervision and control over such work.

3. To the extent that he may deem necessary to carry out the provisions of this order, the Director may utilize the services of the Departments, officers, and agents of the United States; accept the services of officers and agents of the several states, territories, and the District of Columbia, and the subdivisions thereof; and accept voluntary services of private organizations and individuals; and may obtain, by par-

chase, loan, or gift, equipment and supplies from Federal and other public agencies and private organizations and individuals, with or without advertising or formal contract.

4. The Director is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this order.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
February 6, 1941.

APPENDIX E

Order No. 57 of the Director of Selective Service (7 Fed. Reg. 7589) establishing Civilian Public Service Camp No. 57, to which petitioner was assigned, and providing for the performance of work of national importance at the camp provides, as follows:

HILL CITY PROJECT

ESTABLISHMENT FOR CONSCIENTIOUS OBJECTORS

I, Lewis B. Hershey, Director of Selective Service, in accordance with the provisions of section 5 (g) of the Selective Training and Service Act of 1940 (54 Stat. 885) and pursuant to authorization and direction contained in Executive Order No. 8675 dated February 6, 1941, hereby designate the Hill City Project to be work of national importance, to be known as Civilian Public Service Camp No. 57. Said camp, located near Hill City, Pennington County, South Dakota, will be the base of operations for reclamation work in the State of South Dakota, and registrants under the Selective Training and Service Act of 1940, who have been classified by their local boards as conscientious objectors to both combatant and noncombatant military service and have been placed in Class IV–E, may be assigned to said camp in lieu of their induction for military service.

The work to be undertaken by the men assigned to Civilian Public Service Camp No. 57 will consist of the reclamation of

bridges, impounding dam, minor roads, clearing reservoir, and the fighting of forest fires, and shall be under the technical direction of the Bureau of Reclamation of the Department of the Interior insofar as concerns the planning and direction of the work program. The camp, insofar as camp management is concerned, will be under the direction of approved representatives of the National Service Board for Religious Objectors. Men shall be assigned to and retained in camp in accordance with the provisions of the Selective Training and Service Act of 1940 and regulations and orders promulgated thereunder. Administrative and directive control shall be under the Selective Service System through the Camp Operations Division of National Selective Service Headquarters.

LEWIS B. HERSHEY,
Director.

SEPTEMBER 23, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES

Nos. 23 AND 86.—OCTOBER TERM, 1946.

Taze Hamrick Gibson, Petitioner, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
George William Dodez, Petitioner. v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals to the Sixth Circuit.

[December 23, 1946.]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

These cases carry forward another step the sequence in decision represented by *Falbo, Billings, Estep* and *Smith*.[1] Each petitioner has been convicted for violating § 11 of the Selective Service and Training Act (54 Stat. 894, 50 U. S. C. App. § 311), Dodez for failing to report for work of national importance after being ordered to do so and Gibson for having unlawfully deserted the camp to which he had been assigned for such work.[2]

[1] *Falbo* v. *United States*, 320 U. S. 549; *Billings* v. *Truesdell*, 321 U. S. 542; *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.*

[2] Section 11 provides, in part: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five

in each instance the conviction was sustained on appeal [3] and certiorari was granted because of the importance of the questions presented for the administration of the Act. No. 23, 326 U. S. 708, restored to the docket for reargument before a full bench, 328 U. S. —; No. 86, 328 U. S. —.

The principal issues relate to the time of completing the administrative selective process and the effect in each case of what was done in this respect upon the petitioner's right to make defense in the criminal proceedings on various grounds going to the validity of the classification.

In both cases tendered defenses of this character were excluded in the trial court and the exclusion was sustained on appeal. The effect was, in Gibson's case, to rule that although he had completed the administrative process by reporting to the camp, pursuant to the requirement of the *Falbo* decision, nevertheless his remedy, if any, on account of the alleged misclassification was by habeas corpus, not by defense in the criminal cause. 149 F. 2d 751. In Dodez' case it was held that by refusing to report for service at the camp he had failed to exhaust his administrative remedies and therefore under the *Falbo* doctrine he could not question his classification in the criminal suit. 154 F. 2d 637.[4]

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years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Section 652.11 (a) of the Regulations imposes the duty on persons classified IV–E to comply with the order to report for work of national importance; and by § 653.12 assignees are required to report to the camp to which they are assigned and to remain therein until released or transferred elsewhere by proper authority, except when on authorized missions or leave.

[3] 149 F. 2d 751 (C. C. A. 8); 154 F. 2d 637 (C. C. A. 6).

[4] Apparently in both cases the important changes in the applicable regulations made after the *Falbo* decision were not called to the attention of the trial courts or the Circuit Courts of Appeals.

I

Both petitioners are Jehovah's Witnesses. Each has claimed consistently since the time of his registration that he is a minister of religion and therefore exempt from training and service under the Act.[5] Each was denied this classification (IV–D), being classified instead as a conscientious objector (IV–E).[6] Administrative appeals were exhausted. Pursuant to the classifications given and the applicable statutory provisions and regulations, Dodez and Gibson were assigned to work of national importance and ordered to report for such work at designated camps.

Dodez refused to go to the camp. But Gibson, thinking the *Falbo* decision required him to report there in order to exhaust his administrative remedies, went to the camp, remained for five days, and then departed without leave. It is undisputed that he intended at no time to submit to the camp's jurisdiction or authority and that he at all times made this intent clear. Everything he did was done solely to make sure that the administrative process had been finished and with a view to avoiding the barrier Falbo encountered in his trial when he sought to question his classification.

Obviously the petitioners have sought to reach the same point, namely, the place at which the selective process is exhausted administratively, but have differed concerning its exact location. Dodez maintains that the

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[5] The exemption is provided by § 5 (d) of the Act, 54 Stat. 885, 888, as follows: "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of the enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

[6] Pursuant to § 5 (g) of the Act, which provides that persons so classified shall be assigned to noncombatant service or, if conscientiously opposed to this, then to "work of national importance under civilian direction."

point was reached, under the applicable regulations,[7] when his preinduction physical examination had been given and he was found acceptable for service by the Selective Service system. This was on February 21, 1944, two months prior to the date (April 21, 1944) when he was ordered to report for work and refused to go.

On the other hand, Gibson argues that until the preliminaries to actual service, including physical examination, were completed at the camp, he was not foreclosed by going through with them from exercising his choice not to submit to the camp's jurisdiction, cf. *Billings* v. *Truesdell*, 321 U. S. 542, or, upon doing so, from asserting the invalidity of his classification in a criminal trial either for failing to report for service or for desertion from the camp. Cf. *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.* Clearly, on the facts and the issues, the question as to Dodez, like that in Falbo's case, is whether he went far enough to exhaust the administrative process; while as to Gibson it is said that he went too far, that is, beyond the point of completing that process, and that this cut off the right of defense concededly available to him at that point.

II

If these cases were controlled in all respects by the regulations effective when Falbo's case was decided, Dodez would seem clearly to fall within the decision's proscription. The Court there said: "Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp. The connected series of steps into the national service which begins with registration with the

[7] See text Part II infra at note 19; also note 13.

local board does not end until the registrant is accepted by the army, navy or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." 320 U. S. at 533. Since acceptability for service was not finally determined under the regulations then applicable until the registrant had reached camp, had there undergone or waived the specified physical examinations, and thereupon had been found acceptable,[8] and since Falbo had not taken those steps, the Court held he was not entitled to question his classification and therefore sustained his conviction.

However, intermediate the *Falbo* decision and issuance of the order to Dodez to report, the regulations governing the procedure relating to selection for service were changed and in a manner which Dodez says relieved him from the necessity of going to the camp in order to complete the administrative process. The Government now concedes, we think properly,[9] that Dodez is right in this view.

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[8] At that time § 653.11 (c) of the Selective Service Regulations provided: "If the assignee indicates that his physical condition has changed since his final type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the Camp Director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service will be retained in the camp or hospitalized when necessary." Cf. note 10.

This provision, effective by Amendment No. 40 on March 16, 1942 (7 F. R. 2093), was eliminated entirely by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, a little more than two months prior to the date specified for Dodez to report for work, namely, April 21, 1944; but was restored in modified form on June 7, 1944, by Amendment No. 236 (9 F. R. 6207), nearly two months before Gibson was ordered to report on August 21 of that year.

[9] A confession of error on the part of the United States "does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible

It is not necessary to review in detail the regulations which were governing in Falbo's case, since they are not controlling in either of the present ones. Although it is now argued that the Court misconceived their effect,[10] we need only to note that it was within the registrant's power to secure a physical examination by the camp physician by indicating a change in his physical condition, it could not be known in advance in any case whether he would demand it, and until this was determined it could not be known finally and irrevocably whether he would be "accepted for work of national importance."[11] The decision therefore correctly ruled that "the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp" and that the board's order to report there for service was "no more than a necessary intermediate step" in the continuous selective process, which was not ended until the last possibility for rejection had been exhausted. Under those regulations there was no final and conclusive acceptance for service until after those procedures at the camp were completed.

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error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Young* v. *United States*, 315 U. S. 257, 258–259.

[10] The contention is that § 653.11 (c) of the Regulations as it then stood, see note 8, provided for physical examination at the camp and possible rejection there only if the registrant on reporting indicated a change in his physical condition and that this was effective only as to persons sustaining such a change, not to others, of whom Falbo was one. The argument assumes that the registrant's actual condition, not the possibility that a change might occur and be found in any case, was controlling not only to determine the outcome of the examination, but to foreclose the possibility that change might be "indicated" and, in that event, final determination of acceptability would be made after the examination.

[11] The Regulation clearly contemplated that upon receipt of such instructions from the Director of Selective Service, the registrant might be rejected or released.

It was exactly in this respect, however, that the changes made in the regulations immediately after the *Falbo* decision [12] and shortly prior to issuance of Dodez' order to report, together with still others made later but prior to the order to Gibson, were effective. The changes were extensive and important. The altered regulations are lengthy. We therefore give a summary in the margin, noting the more important differences between those applicable to Dodez and those in effect as to Gibson.[13]

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[12] The decision was rendered January 3, 1944. The basic changes in the regulations were made January 10, 1944. See text infra at notes 13-17.

[13] After a registrant has been classified IV-E he is given a preinduction physical examination. Reg. §§ 629.1, 629.2. If found acceptable for service he is issued a certificate of fitness. Reg. § 629.32. Thereafter the local board notifies the Director of Selective Service that the registrant is available for assignment to work of national importance, Reg. § 652.1, and such an assignment is sent to the local board. Upon receipt thereof, the local board issues to the registrant an order to report for work of national importance commanding him to report at a designated time and place. Reg. § 652.12. When the registrant reports, transportation to a camp for work of national importance is furnished, Reg. § 652.12. Thereafter he "is under the jurisdiction of the camp to which he is assigned." The local board then can take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status, Reg. § 652.13.

Upon arrival at the camp the registrant (now called assignee in the regulations) is given a physical examination, although at the time the case of Dodez arose specific provision for such an examination was not made in the regulations. See note 8. It was merely provided that "the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned." Reg. § 653.11 (b). However, this regulation subsequently was amended in the form applicable to the case of Gibson. See note 28 infra.

It is of some importance to note that the changes affecting both registrants were made in consequence of the enactment of § 5 of Public Law 197, 78th Congress, approved December 5, 1943. 57 Stat. 596, 599, 50 U. S. C. App. § 304a. This required preinduction physical examinations to be given before the registrant was ordered to report for induction and service.[14] Previously he first had been ordered to report for induction, was then given his preinduction examination by the armed forces and, on being found acceptable, was inducted at once.[15] The major changes in the regulations giving effect to § 5 were made on January 10, 1944, one week after the Falbo decision came down, some taking effect on that date,[16] others on February 2d following. These applied to Dodez. Still others not applicable to him but operative as to Gibson took effect on June 7, 1944.[17]

The changed regulations, following out the command of § 5 of Public Act 197, provided for a preinduction physical examination to be given before issuance of the order to report for induction, rather than afterward. Section 629.1

[14] The statute, in so far as is now material, provided: "Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

[15] Compare the procedure outlined in *Billings* v. *Truesdell*, 321 U. S. 542.

[16] See notes 18, 19, infra, and text for the principal changes.

[17] These are noted specifically infra at note 28 and text.

of Amendment No. 200 (9 F. R. 400–442), effective January 10, 1944.[18] This was the basic amendment. It applied to all registrants subject to call for service, including those classified IV–E. Moreover, by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, § 653.11 of the Regulations applicable to men so classified was changed to eliminate the previously effective paragraph (c) providing for physical examination by the camp physician on indication of changed condition and consequent possible rejection at the camp. Instead the amended regulation stated simply that (a) when the "assignee" had reported to the camp, the camp director should "*complete the Order to Report* for Work of National Importance (Form 50)"; and (b) place, as specified, on the assignee's papers, "a statement that the registrant *is accepted*" for work at the designated camp, stating also the date and place of acceptance; (c) the local board, "upon receiving notice that a registrant *has been accepted for work*," should not "change his classification but shall note the fact *of his acceptance*" on Form 100; and (d), if the assignee failed to report when required, the camp director was to notify the Director of Selective Service.[19] (Emphasis added.)

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[18] Pertinently the basic regulation provided: "Every registrant before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless; (1) he signs a Request for Immediate Induction (Form 219), or (2) he is delinquent. . . ."

[19] Because § 653.11 as changed by Amendment No. 210 is crucial in Dodez' case, the exact language is quoted: "(a) When the assignee has reported to camp, the camp director *shall complete the Order to Report* for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of

The effect of the statute and the amended regulation was to place the order to report for service nearer the end of the administrative process than it had been previously, so far as concerned the power of the registrant to take action which might result in his rejection. The elimination of the provision permitting medical examination at the camp, by Amendment No. 210, removed any chance the registrant formerly had to secure rejection by demanding examination there, and left to be performed at the camp only the formal entries of "completing the order to report" and noting the fact, time and place of "acceptance" upon the assignee's papers, together with the duties of notifying the local board of acceptance or the Director of Selective Service of failure to report.

Although the amended regulations thus speak of "completing the Order to Report" and placing on his papers "a statement that a registrant is accepted," we agree that

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Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

"(b) *The camp director shall*, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), *place a statement that a registrant is accepted* for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement *shall specify the date and place of such acceptance* and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

"(c) Upon receiving notice that a registrant *has been accepted* for work of national importance, the local board shall not change his classification *but shall note the fact of his acceptance* for such work in the Classification Record (Form 100).

"(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service." (Emphasis added.)

these were only formal matters to be performed by camp officials, and left nothing to be done by them or by the applicant after reaching the camp which might result in his being rejected or released from the duty to remain and perform the further duties imposed on him. To construe the regulations otherwise would be to force the registrant not only to perform all requirements affording possibility of relief but also to go through with purely formal steps to be taken by camp officials offering no such possibility. Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson*, 326 U. S. 219. And, as appears from Gibson's experience, by going through with those formalities Dodez would have found himself confronted with the Government's contention that he had gone too far.

We hold therefore, in accordance with Dodez' view and the Government's concession, that he was not required to report to the camp, under the Regulations effective when his order to report became operative, in order to complete the administrative process; and that he therefore was not foreclosed by the *Falbo* decision from making any defense open to him in his criminal trial under the statute or the Constitution aside from the effect of that decision. *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.*; cf. *Billings* v. *Truesdell*, 321 U. S. 542.

This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists however that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced,[20] would support no other verdict than one of

[20] The trial court permitted Dodez to introduce *de novo* evidence intended to show that as of the time of the trial he was a minister. But the court, over objection, declined to allow this evidence to go to the jury.

acquittal and that therefore the trial court should have sustained his motion to dismiss the cause.[21] Accordingly he asks for a judgment here directing that such relief be given.

In the *Estep* and *Smith* cases, after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith.[22] Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues.

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[21] The question was also raised by motion for a directed verdict, which was overruled.

[22] In case each the tendered defenses were substantially two, namely, (1) that a full and fair hearing had been denied in the selective service proceedings, particularly before the local board; and (2) that the undisputed evidence would sustain no other conclusion than that the registrant was a minister of religion. In each case also evidence was tendered and excluded in the trial court to sustain the first of these defenses. Appropriate determination of that defense would require not only reception and consideration of evidence properly tendered upon the issue, but also in consequence thereof determination of issues of fact, including credibility and inferential conclusions, properly to be made in the trial court rather than by an appellate tribunal. Since issues of credibility also may be involved in determining whether the evidence would support no other conclusion than that the registrant was a minister, that question too is more appropriately determinable in the first instance in the trial court. Moreover, it is not certain that another trial will be had or that the identical issues will be presented if one is held.

III

The Government urges that the conclusion we have accepted for Dodez forces the contrary result in Gibson's case No. 23. The argument, as we have pointed out, is not that Gibson fell short of exhausting the administrative process, for he clearly had done this. It is rather that he went beyond what was required for that purpose, thereby became subject to the camp's jurisdiction, and in doing this irrevocably foreclosed himself from defending against the charge of desertion on the ground that his classification was invalid.

The Government's position is founded upon analogy to the cases which hold that one who has been inducted into the armed forces, although wrongfully, becomes subject to military jurisdiction, is thereafter amenable to its processes,[23] and can secure his release from service or military custody only by resort to habeas corpus.[24]

Applying the analogy, the Government insists that when Gibson went to the camp and there went through the preliminary formalities for becoming a member, he became "inducted" as a camp member, just as one becomes a member of the armed forces by undergoing the induction ceremony, cf. *Billings* v. *Truesdell*, *supra*, even though the induction is in violation of his rights. Thereafter, the argument continues, Gibson became subject to the camp's

[23] See, e. g., In re Morrissey, 137 U. S. 157; In re Miller, 114 Fed. 838; *United States* v. *Reaves*, 126 Fed. 127; In re Carver, 142 Fed. 623; In re Scott, 144 Fed. 79; *Moore* v. *United States*, 159 Fed. 701; *Dillingham* v. *Booker*, 163 Fed. 696; United States ex rel. *Laikund* v. *Williford*, 220 Fed. 291; Ex parte Romano, 251 Fed. 762; Ex parte Tinkoff, 254 Fed. 912; Ex parte Kerekes, 274 Fed. 870. But cf. *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876; Ex parte Beck, 245 Fed. 967. Cf. *Kurtz* v. *Moffitt*, 115 U. S. 487.

[24] See In re Grimely, 137 U. S. 147; Stingle's Case, Fed. Cas. No. 13,458; United States ex rel. *Turner* v. *Wright*, Fed. Cas. No. 16,778. See also cases cited in note 23.

"jurisdiction," just as the wrongfully inducted soldier would become subject to military jurisdiction; and, like the latter, cannot raise the illegality of his induction as a defense to a charge of violating any duty imposed upon inducted members; but must seek his relief, if any, by the writ of habeas corpus. Since the Act and the regulations laid upon camp members a duty to remain and perform the further duties prescribed for them,[25] Gibson's departure without leave amounted to desertion; his defense of wrongful classification is no more open to him than a defense of illegal induction would be open to a wrongfully inducted soldier violating a military order; and his remedy, if any, is to apply for release from the camp through habeas corpus.

The argument is supported by extensive reference to the regulations in force when Gibson was ordered to report, including the changes affecting Dodez and the others which became effective June 7, 1944, by Amendment No. 236 (9 F. R. 6207). The important changes this amendment made were two, namely: (1) to reintroduce into § 653.11, the provision applicable in Falbo's case but eliminated as to Dodez by Amendment No. 210, effective February 2, 1944,[26] for medical examinations to be given at the camp to determine change in condition; and (2) to add to the preexisting requirement for the camp director's noting the fact of acceptance on the registrant's papers [27] the explicit new provision that this should be done "irrespective of the determination which is made as a result of the examination." [28]

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[25] See note 2.

[26] See text at notes 18, 19. Under § 653.11, as reintroduced, the physical examination at the camp was given to all "assignees," regardless of whether they indicated a change in physical condition. Cf. note 8.

[27] Cf. note 19, § 653.11 (b).

[28] The alterations made in § 653.11 by Amendment No. 236 will appear from comparing the text of the section prior to the amend-

The Government also emphasizes two other regulations. One is § 652.12 requiring the local board to provide transportation for registrants reporting to it for transportation to the camp. The other, § 652.13, providing that a Class IV–E registrant *"after he has left the local board in accordance with § 652.12* for work of national importance under civilian direction *is under the jurisdiction of the camp* to which he is assigned." [20] (Emphasis added.)

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ment, see note 19, with the following quoted portions, following the amendment:

"(b) As soon as possible after the assignee has reported to camp, the camp physician *shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition* since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

"(c) *Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b)* of this section, the camp director *shall*, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), *place a statement* that a registrant *is accepted* for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement *shall specify the date and place of such acceptance* and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service." Emphasis added.)

The reintroduced provision of § 653.11 became subsection (b) of the amended section and the former subsection (b) became subsection (c) with the added initial provision, "Irrespective of the determination . . . ," etc.

[20] The regulation, § 652.13, reads as follows: "A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. *Such*

The short effect of § 653.11, as altered at the time of Gibson's order to report was to retain the requirements for formal entries of "acceptance" and giving notice, at the camp, which applied to Dodez; to reintroduce the provision for physical examination there; but at the same time to nullify the possibility this presented in Falbo's case for giving relief, by providing that the camp director should note the fact of acceptance "irrespective of the determination made as the result of" this examination.

Taking account of revised § 653.11 as precluding any possibility for securing administrative relief at the camp, the Government regards § 652.13 as marking the precise and crucial line for crossing from the board's jurisdiction into that of the camp, namely, at the point where the registrant begins his journey to the camp. To take this step, it says, is equivalent to the oath in the induction ceremony prescribed for men entering the armed forces, cf. *Billings* v. *Truesdell, supra*; and produces the same consequences for foreclosing the defense of illegal classification, regardless of intention to submit to the camp's jurisdiction, indeed in spite of Gibson's unwavering manifestation of intention not to submit.[30]

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registrant after he has left the local board in accordance with § 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status." (Emphasis added.) 7 F. R. 113.

Section 652.13 was adopted December 24, 1941, became effective February 1, 1942, and therefore was in effect as to Falbo as well as to Estep, Smith, Dodez and Gibson.

[30] The Government does not urge that Gibson waived his rights by submitting to "induction," in the sense of voluntarily surrendering them; it is rather that he acted at his peril in taking steps beyond those required to complete the administrative remedial process, even though he mistakenly thought them necessary for that purpose. The

Much of the argument was devoted to whether, on the basis of the Government's analogy, § 652.13 could be taken to fix the end of the "interval of choice," cf. *Billings* v. *Truesdell*, *supra*, in view of the constantly changing character of the regulations, the absence of any prescribed induction ceremony such as the *Billings* case involved, and the consequent difficulty confronting one seeking to comply with the *Falbo* decision in ascertaining the exact location of such a line.[31] We do not find it necessary to consider the conflicting contentions in this respect, or therefore to scrutinize the regulations with a view to locating such a point. More fundamental considerations are controlling.

We have said that the Government's argument is founded entirely upon analogy, because no case has ruled that one who becomes subject to the "jurisdiction" of a work camp under the Selective Service procedure thereby forfeits his right to defend against a charge of desertion or other breach of duty, on the ground that his classification

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argument is essentially one of forfeiture rather than of waiver. The facts would sustain no implication of intention to submit to "induction" or to surrender any rights.

[31] It is Gibson's position that had he not gone to the civilian public service camp and subjected himself to the physical examination given by the camp physician, see note 29, the courts might subsequently have held that in a prosecution under § 11 he was foreclosed by the *Falbo* doctrine from making the defense that his classification was illegal. He says further that the regulations applicable to Falbo and those applicable to him were so similar that no reasonable person reading them could have determined that under the latter it was not necessary to undergo the physical examination given at the camp in order to complete the administrative process. Indeed, he asserts that in some ways the later regulations were more compelling than those applicable to Falbo, since at the time Falbo was ordered to report the physical examination was required only for those who indicated a change in their physical condition, whereas when he was ordered to report all assignees were required to be given physical examinations. Cf. notes 8, 26.

was invalid. Nor has it been held that his only recourse for release from the camp is by way of habeas corpus. Furthermore, we think there are compelling reasons why the analogy does not hold true.

In the first place, there are obvious and important differences between the two situations which it is sought to connect by the claimed resemblance. Not the least is that in the one instance the person concerned crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights, whereas in the other no such chasm is traversed. The alleged transfer of "jurisdiction" is only from one civilian agency to another, both branches of the Selective Service System, and there is none at all from the authority of the civilian courts as agencies for the enforcement of obligations imposed by the law. There is in fact no change in "jurisdiction" whatsoever, except in the sense that from the time he becomes a camp member the registrant's duties are different and his orders come through different channels of the same agency.

Unlike the man "actually inducted," the person classified IV–E remains a civilian; his duties are not military in character; he is not subject to military discipline or authority; and for violation of duties or orders he cannot be tried by court martial or military tribunal. On the contrary the Selective Service Act expressly provides the same civil penalties and mode of trial for violating duties arising when he enters the camp as for those arising before that time.[32]

There is therefore no such profound change in rights, duties and status as occurs when one crosses the line between civil and military jurisdiction by being "actually inducted" under the rule of *Billings* v. *Truesdell*, *supra*. It was this change and the consequences it entailed together with the statute's command that no one should be

[32] See § 11, note 2 supra.

tried by military or naval court martial in any case arising under the Act until he had been actually inducted,[33] which we there held to require placing the line precisely, not only for exhausting administrative remedies under the *Falbo* rule, but also for marking the point of actual induction at which the registrant's right ends to choose between going forward into the service and incurring the civil liability for breach of that duty.

The person classified as conscientious objector is never confronted with that choice. He is relieved by the Act from any duty to perform military service. He is not threatened with induction. He is in fact farther removed from military status or jurisdiction after he is finally assigned to civilian public service of national importance, and for this reason is rejected for military service, than he was before that time. His choice is not between going into service and taking the civil penalty laid for violating that duty. It is between performing civilian service under civilian authority and incurring the civil penalty for refusing to do so.

Moreover, in the case of one entering the armed forces, the loss of civil rights, including those of recourse to the civil courts other than by way of habeas corpus,[34] results altogether by virtue of the change from civilian to military status. The reasons underlying those rulings do not apply

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[33] Section 11 of the Selective Training and Service Act reads in part: "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person had been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." It was held in the *Billings* case that in view of the legislative history Congress could not be presumed "to have restored by the second 'unless' clause in § 11 what it took away by the first 'unless' clause." Section 11 rather indicated "a purpose to vest in the civil courts exclusive jurisdiction over all violations of the Act prior to actual induction." 321 U. S. at 547.

[34] See notes 23, 24, supra, and text.

in the case of one who does not undergo that change, remains at all times a civilian, subject only to civilian duties and to civil penalties for violating them. There is not the same necessity or compulsion in such a case for bringing about forfeiture of civilian rights, including remedies for questioning the validity of the order the registrant is charged with violating. That compulsion arises from the necessity for preventing interruption of military processes by intrusion of the civil courts beyond the essential minimum of keeping open the habeas corpus channel to show that the military authority has exceeded its jurisdiction in dealing with the individual.[35] It is on this foundation that the forfeiture of other civil remedies is held to take place.

But there is no such necessity, or therefore any such foundation for forfeiture, in the case of one classified as a conscientious objector and assigned for work of national importance. Serious as are the consequences of his refusal to perform that work, dealing with such breaches of duty by the civil courts does not involve, in the remotest sense, interruption or interference by civilian authority with military processes or jurisdiction. Entirely wanting therefore is any such foundation for forfeiture of civil rights as exists in the case of one inducted into the armed services. Without such a foundation the analogy dissolves and with it the asserted forfeiture.

This becomes even more clear when it is recalled that one basis for the forfeiture, which the Government has maintained, is that habeas corpus is available for the person classified IV–E and wrongfully denied classification and exemption as a minister of religion. This remedy, it was asserted, originally, is adequate and exclusive, and therefore should be held to foreclose resort to other forms of relief.

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[35] *Ibid.*

But here again the asserted analogy fails. It has been clearly established that the remedy by way of habeas corpus is open to the wrongfully inducted member of the armed forces to secure his release.[36] But at the argument it was conceded that neither the camp director nor other officials of the Selective Service system are authorized to use force to arrest or restrain one who refuses to remain in the camp. And this, it was also admitted, would make doubtful the availability of relief by way of habeas corpus.[37] Indeed it might well be urged that the remedy is not available for one charged with violation of any duty; whether failure to report to the camp, to remain there, or to perform other obligations, since the only compulsion laid upon such a person by the Act or otherwise is the force of the legal command plus the provision for criminal penalty in case of disobedience.

We need not decide this question, however, and we express no opinion upon it. For it is enough to destroy the analogy the Government seeks to draw that the remedy by habeas corpus is an uncertain one. Should it be found unavailable and at the same time we should rule that petitioner's defense could not be made in the criminal proceeding, he would be left entirely without remedy, a result consistent neither with our decision in the cases of *Estep* and *Smith*, *supra*, nor with the statute. No more, we think, is it consistent with the Act or those rulings to foreclose the right of defense upon the basis of uncertainty whether the habeas corpus remedy might be had.

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[36] *Billings* v. *Truesdell*, 321 U. S. 542; and see the authorities cited in note 24, *supra*.

[37] Cf. *Wales* v. *Whitney*, 114 U. S. 564; *Stallings* v. *Splain*, 253 U. S. 339; *McNally* v. *Hill*, 293 U. S. 131, 137–138; *Weber* v. *Squier*, 315 U. S. 810; *Tornello* v. *Hudspeth*, 318 U. S. 792; *Zimmerman* v. *Walker*, 319 U. S. 744; *United States ex rel. Jones* v. *Crystal*, 319 U. S. 755; *United States ex rel. Lynn* v. *Downer*, 322 U. S. 756; *Baker* v. *Hunter*, 323 U. S. 740.

Finally, Congress has provided expressly for enforcing the duty to report to the camp for work and duties arising thereafter through the criminal proceedings and penalties prescribed by § 11. In its view these were adequate for the purpose. Nothing in the section or the statute, in the light of our prior decisions, can be taken to indicate that Congress intended persons charged with violating such duties to be deprived of their rights of defense on the ground of invalid classification, either absolutely should habeas corpus prove unavailable or contingently depending upon how the doubt concerning that remedy's availability might be resolved. The Government concedes that Congress intended some remedy to be available. We know of no way by which this can be assured, in such a case as Gibson's, otherwise than by permitting the defense to be raised in the criminal trial.

The analogy failing, for both of the reasons we have stated, by which it is sought to confine the remedy to habeas corpus, we think the defense has been left open for presentation in this case and should have been allowed. *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.*[28]

Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the merits, by examining and sustaining his defense. The same course should be followed for Gibson in this respect as was directed for Dodez.

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[28] In this case, as in the *Estep* and *Smith* cases, the United States in a criminal prosecution is asking judicial enforcement of a draft board's command or order. In the *Estep* case, though the Act provided that the order of the draft board should be "final," limited judicial review was permitted. Section 11 of the Selective Service and Training Act does not distinguish between one order of a board and another. Provided that he has exhausted his administrative remedies, the registrant who has not been actually inducted into the armed forces may in defense to a criminal prosecution attack a board's order as arbitrary and illegal.

We express no opinion concerning whether a different result might follow for one in Gibson's position if he should remain at the camp for a substantially longer period and then depart without leave.[*]

The question raised concerning venue has been determined adversely to Gibson's contention by our decision in *United States* v. *Anderson*, 328 U. S. —.

The judgments are reversed and the causes are remanded to the District Courts from which they came, for further proceedings consistent with this opinion.

MR. JUSTICE MURPHY joins in the opinion of the Court for the reasons stated therein and for the additional reasons set forth in his dissenting opinion in *Falbo* v. *United States*, 320 U. S. 549, 555, and in his concurring opinion in *Estep* v. *United States*, 327 U. S. 114, 125.

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